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her application for membership in the Mutual Protective League, namely 54 years, but that she was of the age of 35 years and upwards, at which age she was not eligible for membership in the said society; that in accordance with the application, the benefit certificate and the constitution and by-laws of the defendant, said statement constituted a warranty; that the statement as to her age was untrue, false and fraudulent and thereby the benefit certificate became wholly null and void. (2) that in the application for membership the insured stated she was not subject to or had had, among other diseases, cancer or tumor; that the insured warranted the said statement to be true, but that her statement was untrue, false and fraudulent, and that thereby the benefit certificate was rendered wholly null and void. (3) That the insured, in response to the question "Is your life now insured?" answered "No;" that said answer was warranted to be true, but that it was in fact untrue, false and fraudulent, and thereby the benefit certificate became wholly null and void. (4) That the insured did not sign the application in question wherein said answers were made; that the insured who was alleged to have signed the petition for membership was not the same person who signed the said application and was not the same person who was examined for membership; and that therefore the benefit certificate which was issued upon the said application was procured by fraud, circumvention and breach of warranty; furthermore, that the said application was signed by some person other than Mary O'Brien, falsely representing her age, condition of health and the fact that there was other insurance on her life; which statements were constituted warranties by the application and the provisions contained in the benefit certificate and the constitution and by-laws of the defendant.

On the trial of the case before the court without a jury, the court found the issues for the plaintiff and assessed plaintiff's damages in the sum of \$1000; from the judgment entered on

said finding defendant has sued out this writ of error.

MR. JUSTICE FAN delivered the opinion of the court.

Among the many propositions of law held by the court was the following:

"The court holds that under the certificate of insurance issued to Mary O'Brien, deceased, herein, the insurable age was between twenty (20) and fifty-five (55) years inclusive, and if the said Mary O'Brien, deceased, was of a greater age at the time of her application for membership in said society than fifty-five (55) years, the certificate is null and void."

This indicates the principle of law applied by the court to the facts in evidence upon the trial, on the contention of the defendant that the insured at the time she made the application, was not of the age stated in her alleged petition or application for membership; and it being untrue, false and fraudulent, rendered the benefit certificate wholly null and void.

Upon this issue plaintiff placed in evidence the benefit certificate; the fact that the insured died on October 28, 1912; and that plaintiff was the beneficiary mentioned in the benefit certificate.

Defendant, on its behalf, introduced the application or petition of Mary O'Brien for membership in the defendant organization. Said application contains, among other things, the following statements:

"I, Mary O'Brien, having become acquainted with the objects of your order, do petition for membership in Council 840 and for a benefit certificate of \$1000. * * * I was born on the first day of Mr., 1857, and was 54 years of age at my last birth-day, and am 54 years at my nearest birth-day. * * * I do hereby warrant the truthfulness of the statements in this petition and consent and agree that any untrue or fraudulent statement made herein or to the Medical Examiner, or any concealment of facts by me in this petition, shall forfeit the rights of myself or beneficiaries to all benefits and privileges herein."

The statement is then signed "Mary O'Brien." After this signature follows a list of 48 questions propounded to her by the medical examiner, Dr. Cummings. At the end of these questions

appears the following language:

"I hereby adopt as my own the foregoing answers and statements from 1 to 46 inclusive, whether written by me or not, and declare and warrant that they are full, complete and true to the best of my knowledge and belief, and I agree that the truth of each answer and statement mentioned above shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers.

"I further agree that the foregoing answers and statements together with the preceding declaration, shall form the basis of the contract between me and the Mutual Protective League, and shall constitute warranties of same, and are offered by me as a consideration of the contract applied for, and are hereby made a part of any benefit certificate that may be issued upon this application and shall be deemed and taken as part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as a part of my contract." (*italics ours.*)

Then follows the signature of Mary O'Brien, the insured.

In view of the foregoing language, must not the statement of the insured with reference to her age be considered as a declaration independent and entirely separate from the answers made by her to questions 1 to 46 propounded by the medical examiner? An examination of the application shows that over her signature she warrants the declaration as to her age - which is one of a number of recitals - to be true, and there is no qualification in that warranty. The answers to the questions are also warranted to be true, over her signature, but there is this qualification, "To the best of her knowledge and belief." The benefit certificate itself states that it is issued "in consideration of the statements made and warranted by said member in his application and medical examination, both of which are hereby made a part of the contract of membership." (*italics ours.*) In our opinion, these facts and circumstances clearly indicate that the declaration and the medical examination, though apparently parts of one instrument, were intended to be distinct and separate. The insured herself, in agreeing as follows:

"I further agree that the foregoing answers and statements together with the preceding declaration, shall form the basis of the contract between me and the Mutual Protective League, and shall constitute warranties of same, and are offered by me as a consideration of the contract applied for, and are hereby made a part of any benefit certificate that may be issued upon this application and shall be deemed and taken as part of such certificate."

clearly recognized that distinction and acquiesced therein. That the warranty with reference to her age was distinct from the warranties with reference to questions 1 to 45, was recognized by the court below, in holding the principle of law already set forth and in refusing to hold that the answer "No" to the question "Are you now insured?" did constitute a warranty. Moreover, counsel for appellee, in his oral argument before this court, frankly admitted that the statement with reference to the age of the insured presented a different question than the answers to questions 1 to 45 heretofore referred to; he conceded that the statement as to age was in the nature of a warranty, while the answers to the 45 questions were in the nature of representations which, before they could be considered by the court as determinative of the issue, must be shown to have been wilfully false and material to the risk. He contended, however, that the truth or untruth of the statement as to the age of the insured, which was admitted to be a warranty, was a question of fact, and that the finding of the court on this question was not clearly and manifestly against the weight of the evidence. This brings us to the evidence offered on behalf of the defendant, that the statement made in said application as to the age of the insured, was untrue.

On behalf of the defendant there were read in evidence three policies of insurance issued on the life of the said Mary O'Brien, by the Metropolitan Life Insurance Company. They were issued respectively on December 18, 1895, August 13, 1900, and October 7, 1901. The applications upon which these policies of insurance were issued ^{are} also in evidence in this case. These bear

the signature of the insured by her mark. They appear in the record as defendant's exhibits 12, 13 and 14. In the first, her birth is given as May, 1843, and in the other two, as May, 1845.

In his brief and on the oral argument, counsel for plaintiff maintained that these applications were not in evidence. Counsel for defendant in his brief states that the applications for the insurance were admitted in evidence to show that the insured carried other insurance at the time she applied for membership in the defendant organization. He contends, however, that while the applications for insurance were admitted as evidence of the fact that the insured carried other insurance at the time she applied for membership in defendant ^{corporation,} yet, having been admitted for one purpose, they were admitted for all purposes, and that therefore the statements contained therein over the signature by mark of the insured, must be considered as evidence in support of its contention on this issue with reference to the age of the insured.

Upon a careful examination of the record, we find that the record itself shows the applications to have been admitted in evidence, without any limitation as to the purpose thereof; furthermore, the record shows no objection to their admission in evidence. While counsel for plaintiff contends here, as he did below, that the applications were not competent, yet, having failed to object to the admission thereof in evidence, and having assigned no cross-appeal upon the action of the court in admitting them in evidence, we cannot consider counsel's contention on the question of their competency. They are in this record and must be considered by us in connection with the issue here being discussed. These applications tend to show that the insured, Mary O'Brien, at the time the benefit certificate in the case at bar was issued, was at least more than 35 years of age.

Defendant further introduced the testimony of Mabel Cleveland, a nurse, who at the time of the trial was connected with the tuberculosis sanitarium of the Municipal Court, but who in 1911 was a representative of the Visiting Nurses Association, and as a member of that organization she did work for the Metropolitan Life Insurance Company. She testified that she called upon the insured in connection with work done by the association for the Metropolitan Company; that on one of her visits, she saw one of the aforementioned policies and copied the number therefrom, in sending in her report on a card to the Metropolitan Company. This witness further testified that at the time she visited the insured she (the insured) lived with her daughter, Mrs. Bridget Cannon; that the appearance of her face was like an old lady's, her skin was wrinkled, and that her hands appeared like those of an old lady; and in response to the question what she meant thereby, she said, "Why, a person whose hands are all shrivelled and calloused between the bones, and the fingers not straight." She further testified that the insured appeared to be over 70 years of age.

Frances Don and Lena French testified that although they had never seen the insured in her lifetime, they did see her dead in her casket: that her hair was gray, and her countenance wrinkled; that she appeared to be about 75 years of age. Testimony of a similar character was given by John Don. He, however, had seen the insured in her lifetime while living with her daughter Bridget Cannon, when he took very well.

Bridget Cannon, daughter of the insured, and beneficiary under the policies issued by the Metropolitan Life Insurance Company to which we have already adverted, was called as a witness by the defendant. While counsel for both sides contend that her testimony is favorable to their respective contentions, yet as we read the evidence, we believe it is more consistent with the contention of the defendant.

Against this testimony, the plaintiff is forced to rely upon the evidence of the plaintiff, who stated that the insured, in her opinion, was a woman of about 40 or 45 years of age; the testimony of James O'Brien the undertaker, who expressed the opinion that the insured was between 50 and 60 years of age; and the certificate of the medical examiner which was attached to the application. As we read this certificate, it has no important bearing upon the issue here being discussed.

While we recognize that the burden of proof on this contention is upon the defendant, yet we believe from a reading of the record in this case, that the defendant clearly established its contention by a preponderance of the evidence, and that the finding of the court was clearly and manifestly against the weight of the evidence. Therefore, under the rule laid down in the case of Donelson v. E. St. L. Ry. Co., 235 Ill. 425, the case must be reversed.

Inasmuch as this cause must be tried again, we refrain from expressing an opinion on any of the other issues presented in this writ of error.

For the reasons hereinabove assigned, the judgment of the Municipal Court will be reversed and the cause remanded.

REVEREND AND HONORABLE.

ROBERT E. BEVEREAUX & JOHN D. RUBLY, doing business as BEVEREAUX & RUBLY,
Defendants in Error,
vs.
H. O. JEHU,
Plaintiff in Error.

EXHIBIT TO
MUNICIPAL COURT
OF CHICAGO.

192 I.A. 6

STATEMENT OF THE CASE. This is a suit brought in the Municipal Court of Chicago by Robert E. Bevereaux and John D. Rubly, doing business as Bevereaux & Rubly, hereinafter referred to as the plaintiffs, against H. O. Jehu, hereinafter referred to as the defendant, for commissions alleged to have been earned in procuring a purchaser for certain property of the defendant.

Plaintiffs, in their statement of claim, allege that the defendant, on or about June 1, 1913, employed them to secure offers of purchase for his real estate known as 4412 Magnolia avenue in Chicago, Illinois, and agreed verbally to pay 2 1/2 per cent. on whatever purchase price was paid him by any purchaser brought to him by reason of the efforts of the plaintiffs; further, that plaintiffs secured an offer from one Dr. Rosenthal for the purchase of defendant's property, of \$9,000; that defendant shortly after said offer was submitted, negotiated a sale of the said property for \$9,000 to the said Dr. Rosenthal; that by virtue of the agreement entered into, the sale by defendant to the said Dr. Rosenthal was the result of their efforts, and thereby defendant became bound to pay plaintiffs the sum of \$225.

In this statement of claim, defendant filed an affidavit of m. rite wherein he denies categorically the allegations in plaintiffs' statement of claim. Defendant, however, admits that he did sell the property to Dr. Rosenthal, but alleges that the sale was not made through the efforts of the plaintiffs but through a party or broker other than plaintiffs.

The court, upon trial of the case without a jury, found the issues for the plaintiffs, and on such finding entered judgment for ~~same~~ ^{to reverse} ~~fraxinxamixixixixix~~ which defendant has moved out this writ of error.

MR. JUSTICE PAX delivered the opinion of the court.

In February, 1913, defendant, E. O. John, listed for sale with Regelin, Jenson & Company, a real estate firm, his property on Magnolia avenue. By reason of a "blind" advertisement inserted in the newspapers by the said Regelin, Jenson & Company, they learned that one Dr. Wm. H. Rosenthal, a dentist, was in the market for some property. Thereafter, some time in April, C. H. Harvey, then in the employ of the said Regelin, Jenson & Company, called upon Dr. Rosenthal and submitted to him the property of the defendant. It developed that the doctor was really acting only as agent for Miss Ferrett, his fiancée. Negotiations were entered into between Harvey on behalf of Regelin, Jenson & Company, and the doctor, with reference to the purchase of defendant's property. An offer of \$9,000 was made by Dr. Rosenthal to Mr. Harvey, accompanied by a check for \$250 given him as a deposit. This was submitted to the defendant, who refused to accept \$9,000 unless it was net to him. Harvey, however, insisted on a commission of at least \$225. The refusal of this offer was reported to Dr. Rosenthal. The doctor renewed the lease on the premises then occupied by him and looked at other property. This all took place during April, while Harvey was in the employ of Regelin, Jenson & Company. Dr. Rosenthal also testified that some time in June or July he arranged with others to buy property in another locality, and paid a certain deposit in accordance with that arrangement. In June, 1913, Harvey left the employ of Regelin, Jenson & Company and immediately became associated with the plaintiffs, another real estate firm, and Harvey states that he advised defendant of this fact.

Harvey claims that while with the plaintiffs' firm he continued endeavoring to dispose of defendant's property and in discussing the matter with him, the name of Dr. Rosenthal as a prospective purchaser was mentioned.

In July, 1913, Mr. F. W. Arford, with whom defendant had also taken up the sale of his property, having learned from defendant that Dr. Rosenthal was in the market for property, called on the doctor and renewed negotiations for the sale of defendant's property, and the defendant claims that as a result of these negotiations, Dr. Rosenthal purchased the property for \$9,000. Arford was paid a commission of \$50.

The contention of the plaintiffs is, that although Harvey first met Dr. Rosenthal while connected with Regelin, Jenson & Company, yet after he left them and came with the plaintiffs, he had retained Dr. Rosenthal as a customer of the plaintiffs, and that the sale to Dr. Rosenthal was the result of his renewed efforts while with the plaintiffs.

Defendant maintains, however, that all that Harvey did in calling Dr. Rosenthal's attention to defendant's property was done while he was employed by Regelin, Jenson & Company; that at no time while with the plaintiffs did any of his acts result in keeping the doctor interested in the defendant's property, or lead to the consummation of the transaction; that Rosenthal, prior to Harvey's going with plaintiffs, had abandoned all intention of buying the property, and that nothing whatever was done by Harvey, either individually or as a representative of the plaintiffs, to induce Dr. Rosenthal to renew the negotiations which led to the purchase of the property; that, on the contrary, the deal was closed through the efforts of one Arford who had had the property two years before it was listed with Regelin, Jenson & Company, and with whom defendant had again placed the property for sale in July, 1913.

The real issue in this case is, whether or not Harvey, while connected with the plaintiffs, rendered any services which resulted in the sale of the property by the defendant to Dr. Rosenthal.

Upon this question the testimony of Dr. Rosenthal becomes important. He was called as a witness, both by the plaintiffs and the defendant, and nowhere, neither in the trial below nor in the briefs and argument presented by either side, has his credibility been attacked.

While testifying for the plaintiffs, Dr. Rosenthal stated that Harvey, after the property had been seen by both Miss Jerrett and himself, came to him and told him defendant's property might be bought for \$10,000, and that he made him an offer of \$8,500, to which Harvey replied, "If you will make an offer of \$9,000, I will submit it." On cross-examination the doctor said that Harvey stated, "You make me an offer of \$9,000, and if Jehu doesn't accept it, I will not bother you any more about it." That he made an offer and gave Harvey a check for \$850 as evidence of good faith. Two or three days afterwards Harvey returned and said, "Here's your check, doctor," and stated that it was no use - Jehu wouldn't accept it; and that he further said, "I won't bother any more, at least I won't bother you any more about it, may be some time you may get something else;" and that he further stated he didn't think there was any use of his trying to get it for \$9,000. Dr. Rosenthal further testified that from that time on he never again heard of defendant's property until July 8th; that in April he renewed his lease upon the premises which he was then occupying, and in June arranged with several others to buy in another locality, and deposited some money to bind the transaction. He also stated that he had never heard of the plaintiffs before the deal was closed, or until the time of the trial. He also stated that, following the return of his check for \$850 by Harvey, he abandoned the idea of purchasing defendant's property.

Harvey, in his testimony, did not contradict Dr. Rosenthal as to what occurred when the offer of \$9,000 was made, nor at the time when his check for \$2000 was returned. He stated that he submitted other property to Dr. Rosenthal, and further, that after he had become connected with plaintiff, he again discussed with him the purchase of defendant's property. This latter statement was positively denied by Dr. Rosenthal. The only other testimony that he gave having any bearing on the issue whether or not while with plaintiff's firm he did anything to bring about the sale of the property to Dr. Rosenthal, was that after he had left Hegelin, Jensen & Company, he reported to defendant that fact, and that defendant asked him about Dr. Rosenthal; that he told him the doctor had purchased an automobile, had met with an accident and was having considerable trouble because of it, but that he (Harvey) would see him in a few days; that he then went back to see Dr. Rosenthal. As previously stated, Dr. Rosenthal denied that Harvey ever talked about defendant's property to him after that day.

The testimony of Robert E. Bevereaux of the plaintiff firm has no bearing upon this issue, save the inference that may be drawn from the fact that plaintiffs did endeavor to sell defendant's property to other people, among whom was a Mr. Runtz.

Defendant, when called by plaintiffs under section 33 of the Municipal Court Act, testified that he did not list the property with the plaintiffs; that he did know Harvey was with plaintiffs and that he (Harvey) had taken Mr. Runtz up to see his property; moreover, that Harvey, after leaving Hegelin, Jensen & Company, and while connected with plaintiffs, never submitted nor discussed with him any offer of Dr. Rosenthal for the property; that he again listed the property for sale with Mr. F. A. Arford; that Mr. Arford submitted Rosenthal's proposition of \$9,000; that he agreed to accept it providing he (Arford) would accept sixty (60) as his commission.

While on the stand as a witness on his own behalf, he gave much the same testimony, save that he went into matters in greater detail. It is a fair inference, however, from all his testimony, that Arford heard of Dr. Rosenthal through the defendant.

Arford, in his testimony on behalf of the defendant, in the main, corroborated both the defendant and Dr. Rosenthal, as to how the transaction was finally closed.

On this testimony, we believe the court erred in finding the issues for the plaintiff. Dr. Rosenthal clearly testified that after the conversation in April with Harvey, he (Harvey) never took up with him the defendant's property, and that it was through Arford that he again resumed negotiations culminating in the purchase of defendant's property; moreover, that he had abandoned the idea of buying the property. While it is true he did state that he was always ready and willing to buy at \$2,000, that statement must be taken in connection with other circumstances in evidence, namely: the fact that he again leased the premises occupied by him, and that he arranged to purchase other property. These circumstances tend to show that the doctor had actually abandoned at this time, the purchase of defendant's property, and he positively stated that there was no act of Harvey's that brought about the reconsideration of the purchase of defendant's property.

There is nothing in the testimony of Devereaux, Jehu, or Arford, that in any way maintains the contention of plaintiffs in this case. Its only support lies in Harvey's statement, that he told defendant he had changed his position and talked to him about the sale of his property, and that thereafter he was still endeavoring to sell the property, and that he had went after Dr. Rosenthal in connection therewith.

Plaintiffs in this case cannot recover unless what Harvey did while in their employ, might be considered the procuring cause.

of the sale. The record is barren of any evidence that even tends to show that fact. There is nothing in the entire testimony of Harvey, no matter how favorably it can be put by the plaintiffs, which warrants this court in arriving at the conclusion that anything he (Harvey) did while in the employ of the plaintiffs, might be considered the procuring cause leading to the purchase of defendant's property. If any efforts of Harvey can be said to have contributed to the consummation of the sale from defendant to Dr. Rosenthal, the evidence clearly shows that such efforts were made when Harvey was in the employ of Regelin, Jensen & Company; and that firm alone can claim the benefit of any service rendered by Harvey. He could not transfer to the plaintiffs the value of any services he had rendered Regelin, Jensen & Company while in their employ.

We believe the evidence clearly shows that the sale was effected through the efforts of Arford, and that Harvey, while in the employ of the plaintiffs, did not perform any act or render any service which led to the consummation of the sale. We therefore find as a fact in this case, that plaintiffs did not render any service to the defendant in bringing about the sale of the property to Dr. Rosenthal.

For the reasons hereinabove assigned, the judgment of the Municipal Court will be reversed with a finding of facts.

REVEREND.

Finding of facts to be incorporated in the judgment:

We find as a fact in this case, that plaintiffs did not render any service to the defendant in bringing about the sale of defendant's property to Dr. Rosenthal.

115/19

256 - 20186

Appellee,
vs.
EDITH T. NORTON,
Appellant.

APPEAL FROM
COUNTY COURT

COOK COUNTY.

192 I.A. 3

STATEMENT OF THE CASE. This is a suit brought in the County Court of Cook county by Lydia Moody, hereinafter referred to as the plaintiff against Edith T. Norton, hereinafter referred to as the defendant, for labor and services rendered defendant by plaintiff and for moneys paid by plaintiff for the use of defendant, - all at the special instance and request of the defendant. Upon trial of the case, the jury returned a verdict for \$427, upon which verdict the court entered judgment; to reverse which this appeal has been prosecuted.

MR. JUSTICE PAM delivered the opinion of the court.

Defendant contends that the form of action was not proper in view of the evidence given on behalf of the plaintiff; and moreover, that the contract contained conditions which the evidence did not show were complied with, the performance of which were necessary before a recovery could be had; but in the main, the contention of defendant is that the verdict is clearly and manifestly against the weight of the evidence.

Plaintiff filed the following bill of particulars:

"This action is brought to recover, viz.:

Dec. 19, 1907.

Three (3) weeks services at fifteen dollars (\$15) per week, performed by Plaintiff for Defendant in nursing, caring, housekeeping, companion and cook,

\$45.00

June }
July } 1908.
August)

Three (3) weeks services at fifteen dollars (\$15) per week, performed by Plaintiff for Defendant in nursing, caring, housekeeping, companion and cook,

135.00

Nov. 1909.

Four (4) weeks services at Fifteen Dollars (\$15) per week, performed by Plaintiff for Defendant in nursing, caring, housekeeping, companion and cook,

\$60.00

June }
July } 1910.
August }

thirteen (13) weeks, services at Fifteen Dollars (\$15) per week, performed by Plaintiff for Defendant in nursing, caring, housekeeping, companion and cook, also in accompanying Defendant to Mr. Frainer's office,

195.00

Oct. 1910.

Four (4) weeks' services at Fifteen Dollars (\$15) per week, performed by Plaintiff for Defendant in nursing, caring, housekeeping, companion and cook, also in going to Denver, Colorado to secure witnesses for defendant,

60.00

Feb. 1911.

Three (3) weeks' services at Fifteen Dollars (\$15) per week, performed by Plaintiff for defendant in nursing, caring, housekeeping, companion and cook, also in having been called to Chicago by Defendant to accompany her to Keokuk, Illinois, as witness,

45.00

March }
April } 1911.

Six (6) weeks' services at Fifteen Dollars (\$15) per week, performed by Plaintiff for Defendant in nursing, caring, housekeeping, companion and cook,

90.00

1907)
1909)
1910)
1911)

To cash paid out by Plaintiff at Defendant's request,

\$1,000.00

From the bill of particulars, it will be seen that, outside of the last item, they all include charges for services performed for defendant in "nursing, caring, housekeeping, companion and cook," and for all the services there was the uniform charge of \$15 per week.

Plaintiff maintains that these services were performed by reason of a contract entered into with defendant in December, 1907, at the time of the death of defendant's father. Plaintiff came to Chicago upon receiving news of his death and accompanied defendant to Warrington, Illinois to attend the funeral. As to

that took place while at Farmington, plaintiff testified as follows:

"We left on Monday, the following Monday morning, for Farmington, to attend the funeral of her father, and it was there that she asked me to give her my time and it was there that we agreed upon what she should pay me.

"I said to Mrs. Norton at the time, she knew I was working for a living and that I couldn't spend my time here or there or any place.

"Then she said she would pay me \$15 a week for all the time I would spend with her, as I had cases that I was paid \$15 a week.

"I told her I was making \$15 a week and sometimes \$20 a week at my work. And that was the agreement there that I saw to -- that is what she said to me, she said she would pay me \$15 a week as long as I would stay with her and work for her, any kind of work which might come up."

Plaintiff contends that this conversation constituted the contract under which she was seeking to recover for the services performed and for certain cash advanced by her during her employment by defendant. Plaintiff testified that no one was present at the time this conversation was had, save she and defendant.

Defendant positively denied that such conversation ever took place. She admits seeking for plaintiff but states it was only as a friend to be with her in time of bereavement, as the defendant was a very dear friend, not only of hers, but also of her father's in his lifetime.

Plaintiff testified that at this time she was with defendant three weeks, attending to her wants, giving her massage treatments, washing, ironing and doing anything she was asked to do. Defendant denies that plaintiff was attending her as a nurse, companion or domestic, for which any compensation was to be paid on the basis of \$15 per week, and furthermore, that she was with her only one week instead of three. There was no other testimony supporting the various contentions of the parties as to this part of plaintiff's claim.

As to the second item in the bill of particulars, plaintiff testified that in June, 1908, she received a telegram to come to the home of the defendant who was sick with diphtheria; that when she arrived there she found not only the defendant, but also defend-

ant's husband, ill; that there was a nurse - a Miss Joss - in attendance, who, however, stayed only two days, and that she (plaintiff) continued attending to the wants of the defendant, both as nurse and in the care of the household; that after defendant was convalescent she accompanied her and Mr. Norton in their automobile to their summer home at Sabasa Lake; that she remained there until August, and that while defendant was there convalescing, cared for and nursed her, and attended to the household duties.

On cross-examination, plaintiff admitted that she frequently went fishing and boating with defendant and Mr. Norton; that she and defendant worked together in the house, visited neighbors and that she helped receive neighbors when they visited the house; that she took part in everything as though she were one of the family. Plaintiff further testified that she remained at Sabasa Lake until some time in August and then returned to Quincy via Chicago; and that about three days afterwards defendant came to her home in Quincy, where plaintiff took care of her, boarded her and waited on her, for about six weeks.

On cross-examination, when questioned as to how they arrived at the amount due for the time spent with defendant in 1909, plaintiff stated that every time she left defendant they would figure up the time spent and it was agreed she was to receive \$15 per week. Furthermore, when asked the reason why she didn't stay in Chicago to nurse defendant instead of having defendant come down to Quincy, plaintiff replied, "Because there wasn't enough to eat in the house for the bunch, and I went home."

Defendant testified that she sent for plaintiff to come to Chicago at the time she was ill, and that about ten days later they went to her summer home at Sabasa Lake by automobile, and that she (defendant) drove the car part of the trip; that she took things rather easy that summer; that she and plaintiff both attended to

the housekeeping; that there was no nursing done by plaintiff for her; that a young girl would come in every week to do the mopping and heavy work; that during the summer plaintiff's daughter and other friends of the plaintiff would come to visit her as guests of the household; that plaintiff at all times was considered one of the family; that when she was about to return to Quincy, the plaintiff invited the defendant to be her guest at Quincy; that accordingly, a few days after defendant returned to Chicago, she went to Quincy; that while there she was not being nursed or taken care of as a convalescent; that she was merely a guest in the house, occupying much the same position that plaintiff did while visiting defendant at Wabesa Lake. She denied that she and the plaintiff had ever had an accounting as to the time plaintiff spent with her for which she agreed to pay on the basis of \$15 per week.

The daughter and son-in-law of plaintiff testified to a certain conversation alleged to have been heard by them, between plaintiff and defendant, while at Quincy in 1908. The daughter testified that she heard plaintiff say that she was then earning \$15 per week, and that defendant then said, "Well, if that is what you are getting here, I am sure you are worth that to me and I need you and I want you to go home with me."

The son-in-law, in referring to the same conversation, testified that he heard plaintiff say, "I will have to get out and get something to do, I need money." Whereupon defendant is said to have replied, "Well, what wages are you getting?" and plaintiff said, "Well, I have been getting \$15 a week," and defendant said, "Well, if that is all you are getting, you are worth more than that to me."

That such conversation, or any of similar character, ever took place, was flatly denied by the defendant.

In the face of her own testimony on cross-examination, that of her daughter and son-in-law is, to say the least, inconsistent. In the first place, plaintiff claimed that in 1907 she told defendant she was earning \$15 to \$20 per week, which fact determined the amount plaintiff was to receive under the contract which she alleges was entered into in December, 1907, upon which the claim in the case at bar is based. The testimony of her daughter and son-in-law indicates that a contract was made in Quincy in 1906, and that defendant did not know how much plaintiff had been accustomed to receive for her services.

Moreover, it will be remembered that plaintiff stated on cross-examination that the reason why she had defendant come to Quincy instead of taking care of her in Chicago was, that "there was not enough food in the house to feed the bunch;" that defendant's husband was out of work; and defendant's customary allowance of \$100 per month had been stopped pending settlement of her father's estate.

That defendant, under such circumstances, should request plaintiff to work for her and agree to pay her \$15 per week, is hardly consistent with reason and truth; and we are fortified in this view by the fact that the plaintiff did not herself testify that such conversation took place at Quincy in 1906; and if she had, her testimony would have been at variance with what she previously stated, viz., that the contract under which she seeks recovery, was made in Burlington in December, 1907.

With reference to the third item in the bill of particulars, - November, 1906, four weeks' services - plaintiff's entire testimony on this item was, "Then in November, 1906, I was called back here again and I was with Mrs. Norton for three weeks, or four weeks, I should say."

Why she came, what she did, save the statement in the bill of particulars, is not brought out in the evidence. That she may

have come to visit the defendant as a guest is just as consistent with the evidence as that she did work for her. That any work was performed by her as a nurse at any time, or that she was employed at any time, was repeatedly denied by defendant.

The fourth item deals with services rendered during June, July and August, 1910 - thirteen weeks in all. Included in this charge is "accompanying defendant to Dr. Trainor's office." On direct examination plaintiff testified as follows:

"In 1910 I was called here again, in June, and I was with Mrs. Norton during the months of June, July and August. She wasn't well and I did all of her work as it came along. She asked me to stay with her, and we went to her summer cottage at Wabesa Lake and I did the work there. That was in 1910."

On cross-examination she stated that defendant was not in Chicago when she reached there: that she went to Wabesa Lake, and while there, during June, July and August, did everything around the house and took care of defendant. Plaintiff stated that her position in the family was that of a domestic. However, during 1910, as during 1909, she went driving, boating, fishing, visiting with defendant; dined at the same table, entertained friends of the defendant, and was entertained by friends of the defendant. She admitted that defendant and other friends, when visiting, assisted in the work around the house. She stated that in this year, as in 1909, defendant figured up the amount due on a basis of \$15 per week, and as in 1909, no one was present when the accounting was had, save she and defendant.

That plaintiff was called there as a nurse or domestic, was absolutely denied; and furthermore, that there had ever been an accounting. That plaintiff came to Wabesa Lake was admitted, but defendant insisted that she only visited as a guest, as in the previous year.

Witnesses for the defendant who visited her at Lake Wabesa in 1909 and 1910, testified that plaintiff appeared to them to occupy the position of guest and friend of the household; that defend-

ant was active about the house, doing the cooking; and that whenever plaintiff did any work it was in conjunction either with the defendant or some of the other guests in the household.

With reference to the fifth item, - October, 1919, four weeks' services, in which is included a claim for going to Denver to secure witnesses for defendant - plaintiff's testimony on direct examination was as follows:

"Then I was called back in 1919 in the month of October.

"Q. How long, at that time, about? A. Four weeks, three or four."

There is no evidence as to what plaintiff did for defendant in October, 1919; there is not a single detail of any kind of service performed, save on cross-examination, when plaintiff testified that she was requested by defendant to go to Denver and interview a Miss Doyle with reference to becoming a witness in a will contest that had been brought by defendant, arising out of her mother's will, which was to be tried at Galesburg, Illinois.

On cross-examination plaintiff stated that she charged for that service because she was giving her time to the defendant. She admitted that all expenses to and fro, and while at Denver, were paid. xxxxxxxxxx Plaintiff further admitted that there was no express agreement between herself and defendant to pay her \$15 per week for this service, and she also admitted that these services could not be classified as nursing, caring, housekeeping, companion or cook.

Plaintiff depends here upon the original contract which she claims was made in December, 1907, at Farmington, on which to base her charge for an alleged service performed nearly three years thereafter. Defendant admitted that plaintiff went to Denver, but said plaintiff volunteered to go as a friend and for the trip, and because she had a niece there whom she desired to visit. Plaintiff, while admitting that she had relatives in Denver, denied having called on them.

The next item in the bill of particulars, - six weeks' services as a nursing, caring, housekeeping, companion and cook - was on the occasion of plaintiff's having been called by defendant to accompany her to Salesburg as a witness. Relative to this item, on direct examination plaintiff testified as follows:

"Q. When was the next time you performed any services?

A. I was called in here again in February, 1911 to attend to her and go with her to Salesburg."

This constitutes her entire testimony on direct examination with reference to this item in the bill of particulars. On cross-examination she stated that she was called to Chicago first and accompanied defendant to Salesburg; that she was there about nine or eleven days. She was further examined:

"Q. Was there anything said between you and Mrs. Norton at that time that she was to pay you \$15 a week during the time you were gone?

A. No, not at that time."

Plaintiff also admitted that all her expenses while at Salesburg were paid by defendant. Nowhere does it appear in her direct testimony that there was any agreement to pay her anything for this service. Again plaintiff is forced to go back to the original contract to account for her charge of \$15 per week as a witness.

However, plaintiff's evidence on cross-examination is quite at variance with the claim that the contract of 1907 accounted for the charge at this amount. She testified as follows:

"Q. A short time before you met Mr. Norton in my office, did you demand of me (Mr. Trainor) ten thousand dollars from Mrs. Norton?

A. I did not demand it.

Q. Tell the jury what you did.

A. You sent for me. I had a letter from you and I came to your office and you (Mr. Trainor) said to me, 'What is all this racket about, what are all of these women mad at Mrs. Norton for?' I said, 'I don't know, perhaps they were dealt with like I was, when Mrs. Norton promised me money to come to Salesburg and testify and they never got it.'

Q. Did I tell you that? A. And I told you that Mrs. Norton had promised me to give me ten thousand dollars before I went to Salesburg, to testify for her."

Does not this testimony account for her going to Salesburg rather than the contract claimed to have been made in December, 1907? Does not this evidence show that in going to Salesburg to testify, plaintiff relied on a promise entirely different from the contract of December, 1907?

The amount mentioned in this conversation makes the amount claimed at this trial insignificant. Defendant denied ever having offered plaintiff \$10,000 or any other amount, to testify at Salesburg.

With reference to the next item in the bill of particulars, - six weeks' services in "nursing, caring, housekeeping, companion and cook," during March and April, 1911 - plaintiff testified as follows:

"Q. Now, when was there anything further? A. That was some time in the year 1911, that was a part of March and about April or a part of May that I was called here and taken to Janesville.

Q. For how long a period? A. I guess also, about six weeks."

There is no testimony on direct examination as to what she did in Chicago; what the services performed were, if any; how long she remained in Chicago; or how long she was in Janesville. However, when testifying as to the agreement alleged to have been made in 1907, plaintiff, when also asked what services she rendered, stated that she did "washing and ironing and kept house when she was sick, waited on her, gave her massage treatments, and did anything that might turn up;" it might therefore be argued that such was the character of all services rendered, unless otherwise testified to.

There was no claim of any special agreement to pay for the services rendered in this period. It was admitted, however, that plaintiff accompanied the defendant to Janesville and there testified for her in a lawsuit.

The last item in the bill of particulars is for cash paid out by plaintiff at defendant's request, namely, \$75. of this

amount the plaintiff testified that she advanced \$70 for railroad fare, and the balance for meals, and that said sum was expended in connection with the services rendered the defendant.

That this money was advanced by the plaintiff was denied by the defendant. In one instance, - on the occasion of her father's death - defendant stated that she had the manager of the Western Union Telegraph Company at Quincy provide transportation for plaintiff from Quincy to Chicago, at her expense. This was denied by plaintiff, but Mr. Reidy the manager of the Western Union Telegraph Company at Quincy in December, 1907, was brought to Chicago as a witness, and corroborated the defendant in this claim.

Plaintiff's total claim in this case is for \$755. The amount of the verdict was \$280; the difference being exactly the amount claimed for expenditures by plaintiff for the defendant. The jury did not allow a recovery for this sum, although plaintiff did testify with more particularity as to this item than any other set forth in her bill of particulars.

In addition to the testimony of plaintiff's daughter and son-in-law offered in support of her case, and which we have already considered, plaintiff offered the testimony of Dr. Mary Peasler.

Dr. Peasler, it appears, up to a few months prior to the bringing of this action, had been on very friendly terms with the defendant. She also was a witness for defendant in the trials at Salesburg and Janesville, already referred to.

On direct examination Dr. Peasler testified that on April 6, 1910, (she had a distinct recollection of the date) at her home, a conversation between plaintiff and defendant took place in her presence, wherein plaintiff told defendant that she couldn't very well afford to stay any longer, as she was not getting her money; that Dr. Norton replied that she was not in circumstances to pay her at that time, but that as soon as she received the \$100,000

out of her father's estate, she would. Dr. Peasler further testified that plaintiff had worked for defendant in 1907, also during the summer of 1909.

On cross-examination, however, Dr. Peasler testified that she did not know herself what was done by plaintiff in 1907, but had received a card from the plaintiff telling her about it; that she had not been at the summer home of defendant, but had heard defendant say plaintiff did the work.

That any such conversation ever took place or that she ever made any such statements, was categorically denied by defendant. Moreover, plaintiff herself did not testify to any such statements having been made or conversations having taken place; in fact, plaintiff testified positively that from December, 1907, to May, 1912, she never asked plaintiff for any money or mentioned the fact of her not receiving any money. At the time she did mention it to defendant in 1912, she was visiting at the home of Dr. Peasler. Moreover, plaintiff does not claim to have done any work for defendant in April, 1910, while the testimony of Dr. Peasler would indicate that plaintiff had been working for defendant, and because of nonpayment of her wages she was about to leave as she could not remain any longer without getting her pay. This testimony by Dr. Peasler is contradicted not only by the defendant, but by the testimony of the plaintiff herself.

As we regard the evidence, the testimony of plaintiff's daughter and son-in-law and of Dr. Peasler is not corroborative, but stands at variance with the testimony of plaintiff herself.

The testimony of the defendant we have outlined in the course of our opinion. In addition thereto is the testimony of four witnesses, some of whom were visitors at the defendant's summer home, and others at her home in the city. They all testified that plaintiff at all times acted as and appeared to be a friend visiting in the home of defendant.

Nor can we, in reading the evidence, find anything definite as to what there was done by plaintiff for defendant in the way of nursing, save that she "gave her massage treatments." Yet at the very time when these alleged massage treatments were given, defendant employed the services of a professional masseuse who gave her treatments while plaintiff was in defendant's home.

In addition, there is the testimony of Mr. Chipperfield, and Mr. Charles J. Trainor, the latter being counsel for defendant. While we are mindful of the fact that ~~the~~ courts look with disfavor upon the practice of attorneys actually engaged in the trial of a case, testifying on behalf of the cause they represent, yet such testimony is competent, and if helpful for this court in arriving at a proper conclusion, must be considered.

Mr. Trainor's testimony was to the effect that plaintiff demanded that defendant pay her \$10,000, otherwise she would retract her testimony given in the will contest at Salem; and moreover, that she asked a loan of \$100 from defendant's husband.

Mr. Chipperfield also testified to a conversation plaintiff had with him in his office at Canton, Illinois; that plaintiff stated she was entitled to a large sum of money running into the thousands, from defendant; and that she at no time mentioned to him the fact of having any claim against the defendant for services rendered such as set forth in the bill of particulars.

It is true plaintiff denied the conversation verbatim as given by both these witnesses for defendant, but plaintiff did state that defendant had promised her \$10,000 for testifying, and moreover, that she had not kept her promise to pay her for being a witness at Salem as she had failed to keep her promise to others. There is a certainty at least, that the sum of \$10,000 was mentioned; there is a certainty that plaintiff claimed with other witnesses in the Salem case, that defendant had made promises to pay a certain amount for testifying at Salem, ^{which were not kept, and} that she felt aggrieved thereby.



In view of this testimony, we cannot regard as serious her claim that the contract alleged to have been entered into in 1907 providing for a salary of \$15 per week, was intended to cover the services rendered by her at Denver, Saltsburg or Jonesville.

can we
Nor ^{can we} take more seriously her claim for services rendered as a nurse. At one time, on cross-examination, plaintiff testified as follows:

Q. Did you ever take care of her before, as a nurse?
A. No sir, because I never nursed before."

At another place plaintiff testified that she took up nursing as a girl and gave it up after she married, but returned to it again because of financial reverses. While she speaks of having earned \$15 per week as a nurse, there is no testimony in corroboration thereof. That she was a graduate of any institution or what experience she had had in preparing for this profession, the evidence does not show. Moreover, in all of plaintiff's testimony, there is a pronounced absence of detail as to the character of the nursing plaintiff did for defendant; the number of days, if any, that defendant was bedridden; or what defendant's trouble was. In view of the fact that defendant was a physician, one of plaintiff's witnesses a physician, and plaintiff claimed to be a nurse in attendance, it is significant that there was not an iota of evidence as to the character of defendant's illness, or a description of her ailment from which the jury might have formed an opinion as to defendant's physical condition, save the time when she was ill with diphtheria in June, 1909. This is the only real illness mentioned, and on this occasion a trained nurse was already administering to defendant's wants when the plaintiff arrived on the scene. The evidence also shows that the nurse remained for some days after plaintiff's arrival. A few days later defendant and plaintiff motor-ed up to Lake Umbagog, defendant driving the car part of the way.

A. J. C.

While there is no doubt that the plaintiff at various times when she was in defendant's home, did housework and that she may have waited upon her when not feeling well, - as at the time of the death of defendant's father, or when defendant was ill with diphtheria - yet we are of the opinion that the evidence clearly shows that such service was performed while plaintiff was a visitor and a guest in the home of the defendant, and not because she had been employed under a contract entered into in 1907 at Jarrowington, Illinois.

We have already stated that the testimony of the other witnesses offered on behalf of the plaintiff, is not only at variance with that of the plaintiff, but is inconsistent therewith; and that thereby the plaintiff's case became weakened rather than strengthened by such testimony. Therefore, we are irresistibly drawn to the conclusion not only that the plaintiff failed to prove her claim by a preponderance of the evidence, but that the verdict of the jury was clearly and manifestly contrary to the weight of the evidence.

In coming to this conclusion, we are not unmindful of the fact that the jury and trial court saw the witnesses and heard them testify; that the printed page at times does not show the atmosphere that surrounds the persons giving the testimony; and the reluctance of reviewing courts to disturb the finding of a jury after the trial judge has approved the verdict by overruling a motion for a new trial.

In this view of the case, it is not necessary for us to pass upon the other questions raised by appellant on this appeal.

For the reasons hereinabove assigned, the judgment of the county court will be reversed and the cause remanded.

REVEREND AND REMANDED.



MR. JUSTICE SCANLAN, specially concurring:

I appreciate fully the fact that a jury has a far better opportunity than we to pass upon the credibility of witnesses and the weight that should be attached to testimony. They see and hear the witnesses and have the atmosphere of the case, while we have only the evidence in cold type. Nevertheless, after a very careful consideration of the entire testimony in the record - in the light of the above well known rules - I have become satisfied that this is a case in which the verdict is clearly and manifestly against the weight of the evidence. To my mind, there are certain weaknesses of an important character in the testimony for the plaintiff that enable us to settle with certainty where lies the weight of the evidence in the case. I purposely refrain from calling attention to these weaknesses, for the reason that I do not care to prejudice, in the slightest degree, the rights of the plaintiff in any future trial of the case.

There is another reason that has strongly influenced me in reaching the conclusion that the defendant has not had a fair trial. It appears from the record that the attorney for the plaintiff, during the progress of the trial, constantly questioned, in the presence of the jury, the fairness of the court, and apparently appealed to the jury to see that his client did not suffer from the alleged unfairness of the court. I am satisfied that this improper conduct worked to the injury of the defendant.



MR. PRESIDING JUDGE with dissenting:

I am unable to concur in the foregoing opinion. In my judgment, the view of the evidence therein expressed attaches altogether too much importance to the admitted fact that the plaintiff was outwardly treated by the defendant as a guest and a friend and not as a servant. The supposed significance of that fact disappears when the close relations between the parties and their financial circumstances are considered. The evidence shows that the plaintiff and defendant were very intimate friends, and that while the defendant had an income sufficient for her needs, and was the only child of a man of means, the plaintiff was obliged to support herself by nursing. The plaintiff testified that she was making fifteen dollars a week by her work. She also testified, in effect, that when the defendant asked her to remain in the defendant's household, she reminded the defendant that she could not afford to do so because she must earn her living, and that the defendant thereupon promised to pay her as much as ^{she} could earn elsewhere for her time. While she testified that she worked as a domestic, yet in view of the close friendship existing between them, it would be only natural, under the circumstances, that defendant should treat her ^{rather} as a friend and companion, than as a servant. The evidence of third persons, who were ignorant of these facts, as to the apparent position of the plaintiff in defendant's family, becomes of no value whatever under such circumstances, in determining whether the plaintiff was employed by the defendant, as she claimed.

While there are some circumstances in evidence tending to discredit the plaintiff, there are others giving support to her evidence, and I think ^{the whole question,} so far as the alleged employment is concerned, is one of credibility of witnesses, as between the plaintiff, on one side, and the defendant on the other. That question the jury and the trial judge, with the witnesses before them, were better able to determine than this court. Personally, while I am skeptical as to the plaintiff's story of the agreement between the parties, yet

I am not able to say that the verdict is manifestly against the weight of the evidence upon that subject. I agree with the majority of the court that the proof is deficient as to the last three items of the plaintiff's claim for services, but the error in that respect could be cured by a remittitur of \$100. With that exception, I think the judgment should be affirmed.

O. W. ROSENTHAL and J. B. CORNELL,
Co-partners doing business as O.
W. ROSENTHAL & CO.,

Defendants in Error,

vs.

AUGUST TURNER,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

STATEMENT OF THE CASE. This is a suit brought in the Municipal court of Chicago by O. W. Rosenthal and J. B. Cornell, co-partners doing business as O. W. Rosenthal & Company, hereinafter referred to as plaintiff, against August Turner, hereinafter referred to as the defendant, for an amount due for general work of alterations and repairs to a certain building, and for which an architect's certificate was issued on July 19, 1909 in the sum of \$452.68.

The statement of claim sets forth that the amount as due is for general work performed in connection with alterations and repairs to Great Northern and Merle & Heaney buildings located at 14th place and Sangamon street; that the amount sued for was settled and agreed on between plaintiffs and defendant acting through Holabird & Roche, architects, by the issuance of an architect's certificate on the 19th day of July, 1909; attached to said statement of claim and made a part thereof are the architect's certificate, known as plaintiff's Exhibit No. 1, and the contract under which the work was performed, between the parties plaintiff and defendant, known as plaintiff's Exhibit No. 2. Plaintiff also claims interest on said sum, at the rate of five per cent. (5%) from July 19, 1909.

To this statement of claim defendant filed his affidavit of merits, in which he claimed that payments had been made by defendant to said plaintiff and that the architect's certificate set forth in the statement of claim did not take such payments into consideration; furthermore, that the certificate had been procured from the architect by plaintiff without informing the architect of

the true facts, namely, that the account had been paid directly to the plaintiff by defendant without the issuance of the certificate for any of the work which had been performed; further, that the work provided for in the contract was not fulfilled but abandoned, and that payment made February 25, 1909 was in full of all work performed; further, that plaintiff had taken away certain materials the property of defendant and converted same to their own use, without making payment therefor to the defendant, and that the materials so taken were worth over \$200.

On the trial of the case before a court and jury, plaintiff introduced the architect's certificate and the contract already designated as plaintiff's Exhibits Nos. 1 and 2. Plaintiffs called as a witness Mr. Cornell of the plaintiff firm, who testified that the certificate was received by him from the architects, Holabird & Roche; that it was presented to defendant, who referred him first to Mr. Graham the banker, and failing to receive payment of Mr. Graham, he returned to defendant, who then referred him to a Mr. Brenner, who also refused payment; and that no payment had been made up to the time of the trial, on said certificate. On cross-examination he testified in detail as to the circumstances under which the certificate had been issued, and with reference to certain conversations had with defendant. He was asked this question on cross-examination: "When did you conclude your work under the contract offered in evidence, and a portion of which was read by your attorney, Mr. O'Connor?" To which question the court sustained ^{an} objection upon the ground that it was not cross-examination.

At the close of plaintiff's case, defendant moved the court to instruct the jury to find for the defendant; which motion was overruled. Defendant did not offer any evidence on his behalf; whereupon the court instructed the jury orally, and the jury returned a verdict in favor of the plaintiff for \$452.68, upon which verdict judgment was entered, - to reverse which, defendant has sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court:

Defendant contends: (1) The court erred in admitting the architect's certificate in evidence; (2) that the verdict for plaintiff could not stand upon the architect's certificate alone, but that the plaintiffs had to establish by a preponderance of the evidence that they had performed the contract under which the certificate was issued; and (3) that the court erred in sustaining the objection to the question asked by defendant on cross-examination, previously set forth in the statement of facts.

Plaintiff assigns as cross-error the court's oral charge to the jury, that they should not allow interest to the plaintiff on this certificate.

In urging this court to sustain the judgment, plaintiffs depend upon the architect's certificate and its non-payment, and the contract between the parties.

Plaintiff's Exhibit No. 2 - which is the contract in question - recited that the plaintiff was the party of the second part, and the defendant the party of the first part, to the contract; the character of the work to be performed; the fact that Holabird & Roche were the architects representing the owner; it contained among other provisions, the following:

"In consideration whereof, the said party of the first part agrees to pay to the said party of the second part the sum of Seventeen Hundred and Forty-nine and 28/100 (\$1749.28) Dollars, upon the presentation of certificates signed by said architects. Said certificates, however, in no way lessening the total and final responsibility of the party of the second part. * * *

"It is especially understood and agreed, that the amounts to be paid from time to time shall in no case exceed 85 per cent. of the value of the work done, and material furnished; the remaining 15 per cent. of said value to be retained by said first party, as part security for the faithful performance hereof, and not be paid until the expiration of 30 days, after the perfect completion of said work and the payment of all claims for labor and material furnished, and when all the drawings and specifications have been returned to Holabird & Roche, architects. * * *

"And should any dispute arise between the parties hereto respecting the true construction to be followed in said drawings and specifications, or meaning thereof, the same shall be decided by said architects, Holabird & Roche, and their decision shall be final."

The foregoing contains all that is essential for the determination of the questions here in issue.

Plaintiff's Exhibit No. 1 - the architect's certificate - is as follows:

"William Holabird,
Martin Roche,
Edward A. Ronwick.
Holabird & Roche, Architects,
1312 Monadnock Block.
Mr. Mr. August Turner,
Chicago, Ill. July 19th, 1906.
No. 3 6452.68

This is to certify that O. W. Rosenthal & Company is entitled, under the terms of its contract, to the sum of Four Hundred fifty-two and 68/100 Dollars, as part payment for general work of alteration and repairs to Great Northern & Merle & Heaney buildings at 14th Place & Sangamon street and shed at 14th place and Morgan street, Chicago.

Contract	1,749.22
Allowances	153.
Total	1,888.22
Deductions	
Net amt. of contract . . .	1,888.22

WILLIAM
Holabird & Roche
per . . . S . .

Former certificates	865.	
Present do	452.68	
Balance	537.54	
Total	<u>1,888.22</u>	1,888.22

Holabird & Roche, Architects.

Received payment, in full of the above certificate

....."

These two instruments, and the testimony of Mr. Cornell - which was offered for the purpose of showing that the certificate had not been paid - ~~whom testimony that the certificate had not been paid~~ constituted the entire evidence of plaintiff.

Defendant urges that the certificate should not have been admitted in evidence until plaintiff had shown that he had complied with one or two other provisions of the contract, and refers particula

ly to the fact that the contract provided that the balance due was not to be paid "until the expiration of 30 days, after the perfect completion of said work and the payment of all claims for labor and material furnished, and when all the drawings and specifications have been returned to Holabird & Roche, architects." A glance at this provision in its place in the contract at once establishes the fact that this provision has reference only to the 15% that was to be retained as part security for the faithful performance of the contract. ^{The} ~~Further~~ ^{further} defendant contends that the certificate showed that there had been an allowance of \$139 and then argues that the said \$139 was in the nature of an extra, and that they had not complied with the provision in the contract with reference to extra or additional work. An examination of the certificate makes it apparent at once that the amount allowed was well within the 85% which the contract provided should be paid as the work progressed; and furthermore, that there was nothing in the certificate to show that the \$139 allowance was included therein; but on the contrary, the certificate did show that the balance still due under the contract was considerably in excess of the \$139 allowance. Therefore counsel's point that plaintiffs did not first show that they had complied with these provisions in the contract is not well taken.

Defendant further contends that even though the architect's certificate was properly in evidence, yet, standing by itself, it was not sufficient to sustain a verdict for the plaintiffs, but that plaintiffs were first called upon to show that they had made due performance under the contract. We cannot subscribe to that contention, and no authorities cited by defendant sustain that contention. The contract in question provided for the issuance of an architect's certificate; it further provided that payments be made to the extent of 85% of the value of the work as the

work progressed. The architect's certificate states upon its face that it was issued under the terms of the contract. It is not within the prohibition of the 15% payment and does not state that it is for any part of the allowance of \$139. Clearly, under this contract, the architect's certificate issued thereunder by the person authorized to issue same, was prima facie evidence that so much of the work had been completed under the contract as to entitle plaintiff to payment of the amount it was issued for, namely, \$452.68. ~~It was not necessary for plaintiff to prove performance~~

Therefore ~~under the contract~~ this certificate, together with the evidence of its non-payment, clearly made out plaintiffs' case. Concord Apart. House Co. v. O'Brien, 229 Ill. 360; Lohr Bottling Co. v. Ferguson, 223 Ill. 88; Stose v. Heissler, et al., 120 Ill. 433; Downey v. O'Donnell, et al., 92 Ill. 559; McAuley v. Carter, et al., 22 Ill. 53.

Defendant complains that the court erred in refusing to permit him to ask the following question on cross-examination: "When did you conclude your work under the contract offered in evidence, and a portion of which was read by your attorney, Mr. O'Connor?" A careful review of the answers given by this witness on direct examination shows the question was not proper on cross-examination.

Defendant did not introduce any evidence. His affidavit of merits did set out a defense. It was in the nature of a claim that the architect's certificate was issued through fraud or mistake - which under the authorities previously cited, ^{would} ~~should~~ have been properly presented as a defense; but this the defendant did not choose to do.

Upon the record in this case, however, the jury could not have found otherwise than for the plaintiff, and the court was fully warranted in entering judgment on said verdict.

Plaintiff assigns as cross-error the action of the court in instructing the jury not to allow plaintiff interest upon the architect's certificate. Our examination of the record impresses us with the belief that plaintiffs did not object to this ruling of the court, but rather that they waived their objection thereto. When the court asked counsel for plaintiff whether he wished to stand upon his request for allowing interest, he replied, "I am arguing it with myself." Counsel for defendant then said he would rest with the understanding that interest would not be allowed, as otherwise he would put in some evidence on the question of interest; to which statement counsel for plaintiffs replied, "I think this court will be the court of final resort on that question anyhow." The court then instructed the jury not to allow any interest; to this instruction no objection was made by plaintiffs. While it is true, that under Section 81 of our Practice Act, where a case comes up to this court for review in the form of a stenographic report it is not necessary to preserve an exception, yet the record must show that the ruling complained of was an adverse one; therefore plaintiffs cannot complain of such error at this time.

Finding no reversible error, the judgment of the Municipal court will be affirmed.

AFFIRMED.

SINGH, GURPREET

BOOKS CONT'D.

1921.A. 12

Mathilda A. Ford, complainant herein, filed a bill for separate maintenance against Percy J. Ford, defendant herein, in the Circuit Court of Cook County. From a final decree entered in that case on July 19, 1913, the complainant perfected an appeal to the Appellate Court of the first district. The complainant then filed a petition in which she prayed for an order on the defendant to make suitable allowance for temporary alimony pending the appeal, and that defendant pay to her a sum of money for solicitor's fees and expense money in defending said appeal. To this petition defendant filed a stern answer wherein he set forth facts which he maintains: (1) have a bearing upon the amount, if any, that should be allowed; and (2) show why the prayer in the petition should be denied in its entirety.

On the hearing had on this petition and answer, the chancellor entered a decree in which the defendant was ordered to pay complainant during the pendency of the appeal the sum of \$50 per week. From this decree defendant has prosecuted this appeal.

in preparing the record for review in this court, the defendant asked the clerk of the Circuit Court to prepare a transcript of the record of the supplementary proceedings in said cause, and designated what should be included in the record. In using the term "supplementary proceedings in said cause," he necessarily must have distinguished between the proceedings on the petition and answer upon which the decree was entered, complained of in this appeal, and the original proceedings had at the time the case was

originally tried in which a final decree was entered July 19, 1913. The record was prepared by the clerk as directed, and is certified to this court by the clerk as a "supplementary transcript of the record, according to a certain praecipe filed in the office of the clerk of the Circuit Court, in said cause." Upon this record defendant asks this court to reverse the decree, for two reasons: (1) That the allowance for temporary alimony, suit money and solicitors' fees is unfair, unreasonable, excessive and burdensome; and (2) that the court erred in entering any allowance whatever on the petition and answer, because complainant had not complied with certain provisions of the final decree entered July 19, 1913, and by reason of such failure she was not entitled to the relief prayed for.

In reply thereto, complainant contends that the record presented to this court by the appellant is incomplete and does not bring to this court all the evidence and proceedings that were before the trial court at the time the decree was entered, and it must therefore be presumed that if a complete record were here, the evidence and proceedings therein would show that the court below was warranted in entering the decree complained of.

Defendant relies upon his sworn answer in support of his contention that the court erred in entering the decree complained of. The certificate of evidence in this case merely presents the answer as a pleading on file, although verified. While any of the facts set forth therein may be treated as an admission by the opposing party, yet unless it was offered in evidence, and that fact appears in the certificate of evidence presented to this court, we cannot consider the facts set forth in the verified answer, in support of either of defendant's contentions why the decree should be reversed.

The certificate of evidence states that this cause comes on to be heard upon the petition of the complainant, the answer of

the defendant, and upon the pleadings and transcript of the testimony taken upon the trial of said cause and the final decree rendered therein. The proceedings leading to the decree complained of were supplementary to a hearing had on the writs of the cause resulting in the final decree of July 19, 1915. Therefore, independent of the aforesaid recitals in the certificate of evidence, this court must proceed upon the presumption that the chancellor hearing the petition and answer, in arriving at his conclusion, took judicial notice of the record upon which the final decree of July 19, 1915 was entered, and that decree itself. The certificate of evidence does not set forth that record nor the decree. While it was proper for the chancellor to take judicial notice of the record and proceeding in the court, and in the same case, we, however, have no such right. Moreover, in the decree complained of on this appeal, the court stated in express terms that it considered the record in this cause and heard the arguments of counsel on the present petition of complainant and the answer thereto by the defendant.

We must presume that if this record and final decree were before this court, the facts set forth therein would have been sufficient to warrant the entering of the decree complained of. In arriving at this conclusion, we are following the rule laid down in the case of Patterson v. Northern Trust Co., 230 Ill. 334, wherein it is said:

"It will be noted that the transcript of the record in this case was prepared upon a praecipe filed by appellant and does not purport to be a transcript of the complete record. Apparently, only a small portion of the evidence appears to have been incorporated therein. In the absence of a certificate preserving all the evidence it will be presumed that there was sufficient evidence to sustain the finding of the specific facts in the decree."

The rule of law announced in the aforesaid case was followed by this branch of the court in the case of Patterson v. Northern Trust Co., 170 Ill. App. 801.

ABLE TRANSFER COMPANY, a Corporation,

Defendant in Error,

vs.

WILLIAM E. DEE CO.,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

192 I.A. 14

MR. JUSTICE SCARLAN delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, brought by the defendant in error, hereinafter called the plaintiff, against the plaintiff in error, hereinafter called the defendant, to recover a balance of \$300 alleged to be due under a written agreement between the plaintiff and defendant.

The said agreement is as follows:

"Chicago, Feb. 6, 1912.

Wm. E. Dee Co.,
Chicago, Ill.

TO Wm. E. Dee Co.:

We agree to sell you for the sum of five hundred dollars (\$500) the following described machinery. The same to be loaded aboard cars at C. & N. W. R.R. Co., Chicago, Ill., one twelve-inch J. M. Mahewen automatic engine direct connected to one Madell & Sntz 30 H.P. one hundred and twenty-five volt Gen. complete.

Terms three hundred dollars, to be paid at signing of this contract, and balance of two hundred dollars to be paid when engine and generator are tested and found to be in satisfactory condition.

Signing of this indenture shall constitute a contract.

ABLE TRANSFER CO.,
Thos. G. Ryan, Mgr."

Upon the execution of this contract, the defendant paid to the plaintiff \$300 as agreed, and the plaintiff shipped the engine and generator to the defendant in accordance with said agreement, and the same were delivered to the defendant about April 1, 1912. Shortly after the receipt of the machine, the defendant tested the same and found that it was not in a satisfactory condition, and it thereupon notified the plaintiff, by letter dated April 23, 1912, that the machine was not in a satisfactory condition, and stated that it would put it in a satisfactory condition at the expense of

the plaintiff. The defendant, not hearing from the plaintiff, thereafter expended \$200 in rewinding the armature of the generator and putting the machine in a satisfactory condition. The defendant never offered to rescind the contract of sale or to return the engine and generator to the plaintiff, and it has since continued to operate the same at its place of business at Mecca, Indiana. In the present case, the plaintiff sued to recover the unpaid balance of \$200 alleged to be due under the contract of sale, and the defendant claimed the right to recoup in this action the amount expended in putting the machine in a satisfactory condition. The case was tried before the court without a jury, and the issues were found against the defendant and plaintiff's damages were assessed at \$200. The court entered judgment on the findings, and the defendant has sued out this writ of error to reverse said judgment.

The court, in finding for the plaintiff, held as a matter of law, "that the defendant could not recoup the amount expended by it in putting the machine in satisfactory condition but that the defendant should have rescinded the contract of sale and returned the machine at the earliest practical opportunity if it was not satisfied with the machine." The defendant contends that by the terms of the contract the plaintiff expressly warranted that the machine would be in a satisfactory condition when delivered to the defendant, and that therefore it had the right to retain the goods without paying to the plaintiff the balance due, and to recoup damages in the present action to the amount of \$200 for the said breach of the warranty. The plaintiff contends that the contract does not in any way warrant the condition of the machine.

The sole question for us to determine is, did the plaintiff, in the contract, expressly warrant the condition of the machine at the time of the delivery of the same to the defendant?

It has been repeatedly held by our Supreme Court that no particular form of words is necessary to constitute a warranty, but it is a question of intention, to be gathered from the words used, and from the circumstances and subject matter of the case. Where the representation is positive and relates to a matter of fact, it constitutes a warranty, but where the representation relates to that which is a matter of opinion merely, it does not constitute a warranty. Reed v. Hastings, 82 Ill. 58; Robinson v. Harvey, 82 Ill. 58; Thorne, et al. v. McLaugh, et al., 78 Ill. 81. The contract in the present case expressly provides that the balance of \$200 is to be paid "when engine and generator are tested and found to be in satisfactory condition." While the agreement is somewhat crudely drawn, we are of the opinion that by the said clause, just referred to, the plaintiff expressly warranted that the machine would be in a satisfactory condition when delivered to the plaintiff, and if the plaintiff failed to deliver the machine in a satisfactory condition, there was a breach of the warranty on the part of the plaintiff, and, under such circumstances, the defendant was not required to rescind the contract and to return the machine, but had the right to recoup the damages sustained by reason of the breach to the amount of \$200. Underwood et al. v. Wolf, 131 Ill. 425.

It was not denied by the plaintiff that the defendant, after the receipt of the machine, was compelled to expend \$200 in putting the same in a satisfactory condition, nor was it disputed by the plaintiff that the repairs were necessary and proper under the warranty - if the contract contained the alleged warranty. The trial court, therefore, should have entered a judgment in favor of the defendant for costs. For the reasons stated, the judgment of the Municipal Court of Chicago will be reversed and a judgment will be entered in this court in favor of the defendant for costs.

REVERSED AND JUDGMENT HERE IN FAVOR OF
THE DEFENDANT FOR COSTS.

219 - 10300.

CHRISTIANA DOMBROWSKI,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Appellant.

APPEAL FROM

COUNTY COURT

COCK COUNTY.

192 I.A. 16

MR. JUSTICE SWANLAN delivered the opinion of the court.

This is an appeal from a judgment for \$1,000, entered in the County Court of Cock County, against the Metropolitan Life Insurance Company, a corporation, appellant, hereinafter referred to as the defendant, and in favor of Christiana Dombrowski, appellee, hereinafter referred to as the plaintiff. On April 3, 1910, the defendant company issued a policy for the sum of \$1,000 on the life of Otto T. Dombrowski. The plaintiff was the wife of the said Dombrowski and the beneficiary in the policy. The policy was issued upon a written application therefor, a copy of which was attached to and made a part of the policy. In the application for the policy Dombrowski stated that he had never had any disease of the lungs, or habitual cough, or spitting of blood; that he never had pneumonia, pleurisy, bronchitis, rheumatism, dropsy, paralysis or dyspepsia; that he had never been treated for sickness at any asylum, hospital or sanitarium; that he had never been attended or treated by any doctor since he was a boy, and that he had never had any illness since childhood. The policy contained the following clause: "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid or be used in defense of a claim under this policy unless it is contained in the written application therefor, copy of which is securely attached hereto and made a part hereof." The policy also contained a provision that a grace of thirty-one days would be

granted for the payment of every premium after the first. On October 8, 1911, a premium fell due and remained unpaid more than thirty-one days thereafter, and by the terms of the policy, it lapsed on November 8, 1911. On November 11, 1911, Dombrowski made a written application for a restoration of the policy, in which he stated that he was then in sound health and had not since the policy was issued been sick or afflicted with any disease, "or been physically prevented from attending, or unable to attend to business, or consulted or been attended by any physician." The application also contained the following: "And it is expressly agreed by the undersigned that if said company grants said restoration of the policy it shall be upon the condition that if any of the foregoing statements be in any respect untrue the policy will be void." Upon this application the policy was restored.

The defense interposed by the insurance company was that the policy was void on account of false statements in the original application and in the application for a restoration of the policy.

Dr. Hall, a witness for the defendant, testified that he treated the insured from April, 1909 to May, 1910, for dropsy, paralysis to a certain extent, and dyspepsia; that his condition at times was very serious; that he never succeeded in curing him.

Dr. Thorpe, a witness for the defendant, testified that he treated the insured in March and April, 1911, for pleurisy and inflammation of the lining of the lungs and for a troublesome cough, and that he cannot say that he cured him.

Dr. Miller, a witness for the defendant, testified that he was connected with the Wesley Hospital in August, 1911; that the insured came to said hospital as a patient on August 10, 1911, and remained a patient there until August 23, 1911, during which time he was treated for pleurisy; that the insured was then suffering from pulmonary tuberculosis or consumption, which caused the pleurisy; that his sputum was examined and showed tubercular bacilli.

The proofs of death submitted to the company and signed by the plaintiff, were offered in evidence by her. They showed that Dombrowski died February 25, 1912, of pleurisy and tuberculosis; that he had been under treatment at the Wesley Hospital for his last sickness from August 19 to August 23, 1911, and that while there he was attended by Dr. J. E. Miller, and that the duration of his last illness was ten months.

The defendant has assigned and argued many alleged errors. In our judgment it is only necessary for us to pass upon one of these. The following instruction was given to the jury at the request of the plaintiff:

"The court instructs the jury that it is for you to determine from the evidence the extent of the sickness of the said Dombrowski and whether it was of such a character or nature as to make his reply to the interrogatories material misstatements. It is for the jury to say, from the evidence, in regard to the extent of the nature and kind of sickness, whether the attack which the insured suffered from was of a character to make his answer, 'never sick since childhood,' a material statement; the burden of proof is on the defendant; the company sets up the defense and the jury must be satisfied from the evidence that the untruth of the statement has been established."

The defendant insists that the instruction is erroneous and prejudicial for several reasons. One of the reasons urged, in our judgment, is clearly good. The defendant contends that by the above instruction it was required to prove its defense by evidence that satisfied the jury, or the verdict should be for the plaintiff, and that this instruction imposed upon it a higher degree of proof than the law requires. "It is always error to instruct a jury in a civil case that the party having the burden of proof must furnish evidence which will satisfy the jury, and instructions of this character have so often been condemned that the rule is well understood and firmly established." Sonnenbary v. Mertz, 221 Ill. 542. "It would seem that to require the juror to be 'satisfied' would necessitate removing from his mind all reasonable doubt of the truth of the matter. It has repeatedly been held by this court, in civil

cases, that the jury are only required to find from a preponderance of the evidence, and that to require that they be satisfied imposes a higher degree of proof than the law requires." Wolfe v. Rich, 149 Ill. 436. It is quite clear that the giving of the above instruction constituted error highly prejudicial to the defendant. The judgment of the County Court of Cook County must therefore be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

340 - 17739.

PATRICK T. McBRIDE and ABBIE
McBRIDE,

Appellees,

vs.

EDGAR F. SENEY and ROWLAND T.
ROGERS, co-partners as SENEY,

ROGERS & COMPANY,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

1921.A. 18

STATEMENT OF THE CASE. This was an action of the first class in the Municipal Court of Chicago, brought by Patrick T. McBride and Abbie McBride, his wife, appellees, hereinafter called the plaintiffs against Edgar F. Seney and Rowland T. Rogers, co-partners doing business as Seney, Rogers & Company, appellants, hereinafter called the defendants. The suit was brought to recover \$5,000 damages for alleged breach of a building contract and a supplemental contract thereto. The defendants were building contractors in Chicago. The plaintiff's statement of claim alleges the making of a contract between the plaintiff and the defendants, dated May 25, 1909, and a supplemental contract of the same date, whereby the defendants agreed to construct for the plaintiffs a building on certain real estate located in the city of Chicago; said building to be in accordance with certain plans and specifications adopted by the parties. "And the plaintiffs aver that the defendant did not construct and complete said building agreeably to said plans and specifications and in accordance with their said covenants and understandings contained in said contract but therein made default and constructed said building defectively, improperly and insufficiently, in the following particulars, to-wit:" (the plaintiff here states nineteen particulars in which they claim defendants made default; also the amount of damages alleged to have been sustained as to each particular). The total amount of the damages are alleged to be \$5,000.

The defendants filed an affidavit of merits in which they admit the contracts in question, but deny that the said building was not constructed in accordance with the said contracts, plans and specifications, and allege that said building was constructed "in accordance with the understanding of the parties to said contract at the time of doing said work and the same was in substantial compliance with said contract." The affidavit of merits further alleges that the various departures from the contract alleged by plaintiffs in their statement of claim occasioned no damages to the plaintiffs, and were made with the acquiescence of the plaintiffs. The case was tried before the court and a jury. A verdict was returned in favor of the plaintiffs for \$5,000. The plaintiffs remitted \$2440 from the verdict, and the defendants' motion for a new trial was overruled and judgment was entered for \$2560, and this appeal followed.

MR. JUSTICE SCANLAN delivered the opinion of the court.

The defendants have assigned and argued a number of alleged errors, all of them, save one on the question of damages, of an extremely technical character, none of which goes to the actual merits of the case, except the one referred to. The first of these contentions is thus stated in their brief:

"The plaintiffs declared on a contract and a contract supplemental thereto executed by both of them and the defendants. They offered in evidence a contract and a contract supplemental thereto executed by the defendants and Patrick T. McBride only. When these contracts were offered in evidence the defendants objected thereto on the ground that they were not contracts between the parties to the suit, because they were not signed by one of the parties. Defendants' objection was overruled by the court and the contracts were received in evidence. This was error. There was a fatal variance between the contracts described in the statement of claim and the ones offered in evidence, notwithstanding that this variance was specifically pointed out, the court, over the objection of the defendants, admitted the same in evidence."

We find by an inspection of the record that the defendants, at the time of the offer of the said contracts, made two objections

to the introduction of the same. These objections were thus stated by the counsel: "They have declared on a contract signed by the plaintiffs and executed by the plaintiffs." "We object to each of them on the ground that they don't bear the signature of one of the plaintiffs."

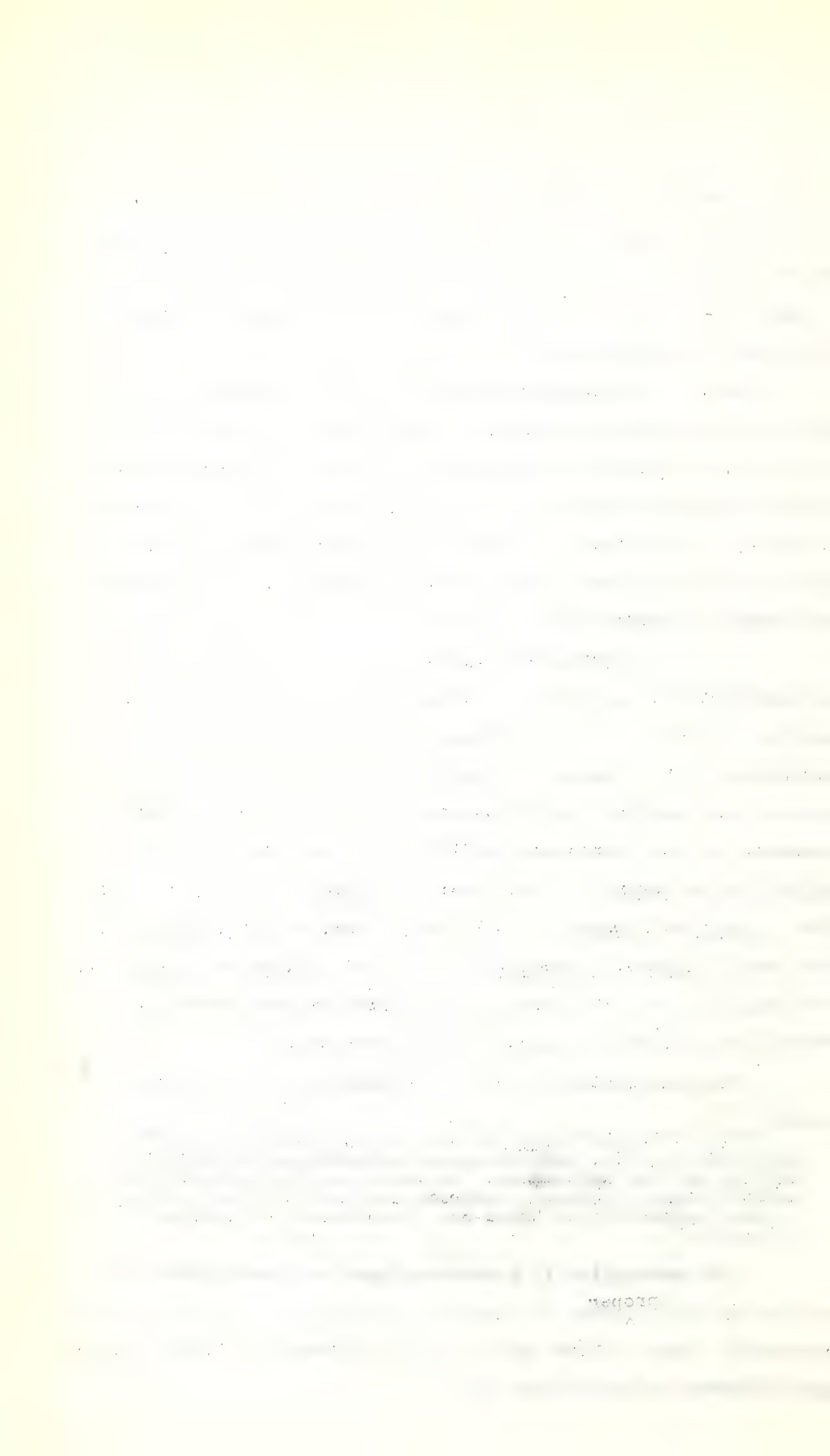
As to the alleged variance, (assuming that by the said objections the defendants raised a question of variance) which is of course predicated upon the theory that the contracts offered in evidence were not the ones described in the statement of claim, we find that the statement of claim does not allege that the contracts were signed by the plaintiffs. The claim of variance is therefore without merit.

The second ground of objection to the introduction of the contracts is also without merit. The mere fact that Mrs. McBride did not sign the contracts offered in evidence is of no importance in this case. The evidence shows clearly that she accepted and adopted the written contracts, and she therefore assented to their terms and conditions and was bound by them. Ullsperger v. Meyer, 217 Ill. 222; Northman v. Peters, 201 Ill. 129; Memory v. Niepert, 131 Ill. 223; Ames v. Moir, et al., 130 Ill. 222; Plumb v. Campbell, 129 Ill. 101; Miere v. Fuller Co., 107 Ill. App. 49. The defendants also treated her throughout the entire transaction as a party to the contracts.

The next contention of the defendants is thus stated by them:

"The plaintiffs in this case, Patrick T. McBride and Abbie McBride, declared on contracts between themselves jointly and the defendants. On the trial they proved contracts between Patrick T. McBride only and the defendants. It thus appeared that there was a misjoinder of parties plaintiff."

This contention is predicated upon the theory that Mrs. McBride was not a ^{proper} party to the suit, because she did not sign the contracts. What we have said as to the defendants' first contention disposes of the present one.



All of the papers, contracts, notes, etc., were drawn by the defendants, and each of the contracts recites that it is "between Patrick T. McBride and Abbie McBride, his wife, parties of the first part, and Seney, Rogers & Company, a partnership, party of the second part." The McBrides also executed for the benefit of the defendants, and in pursuance of the terms of the contracts, two trust deeds, with accompanying series of promissory notes: the first trust deed securing the principal sum of \$3,500, and the second the sum of \$1,450. These papers were all signed by McBride and his wife. The contracts were executed in duplicate, and the evidence tends to show that the duplicates of the contracts retained by the defendants were signed by both of the plaintiffs. It is somewhat significant that the duplicates of the defendants, according to the testimony of the defendant Seney, were lost. The evidence clearly shows that throughout the entire transaction the defendants consulted with and dealt with both Mr. and Mrs. McBride.

The next contention of the defendants is thus stated in their brief:

"The record thus shows that Patrick T. McBride was the sole owner of the premises upon which this building was constructed. This fact, together with the warner of the construction of the building as disclosed by the record, placed the legal title to the building in Patrick T. McBride; Abbie McBride co-plaintiff, having no legal title or interest whatsoever in the lot upon which the building was constructed would have no legal title to or legal interest in the building itself. Having no legal title or interest in either lot, or the building constructed thereon under the contracts in question, she would have no right to maintain an action either in her own name or jointly with Patrick T. McBride for damages for failure to construct the building according to the plans and specifications, because she had no legal interest in the subject-matter of the controversy. How can it be logically maintained that Abbie McBride has sustained any damages by reason of any failure by the defendant to erect a building in which she did not and could not have any legal interest therein whatsoever? If she had no title to the building, as constructed or as it should have been constructed, she certainly sustained no damages."

It is a sufficient answer to this contention to say that the defendants, by their conduct in the premises, recognized that Mrs.

McBride had some right - legal or equitable - in the property in question, and they will not now be heard to assert that she had no interest in the same.

The next contention of the defendants is thus stated in their brief:

"At the close of all the evidence the defendants moved the court to instruct the jury to find the issues for them, on the specific ground that the record showed that the property upon which the building in question was constructed, and the building itself, was the sole property of Patrick T. McBride. The record not only fails to show a joint right of recovery in the plaintiffs, but it affirmatively appears thereby that Abbie McBride had no legal title to, or interest in, the subject-matter in controversy. It therefore follows that the court erred in overruling defendants' motion to instruct the jury to find the issues for them, and the judgment below cannot be sustained."

What we have said as to the defendants' last contention disposes of this one.

The defendants next contend that the court erred in admitting in evidence, over their objections, seven of the specifications, on the ground that there appeared to have been alterations, consisting of interlineations and erasures, in the same. It is sufficient to say in answer to this contention that the evidence clearly shows that the defendants were not injured by the alleged changes, no matter when or by whom they were made. One change was beneficial to the defendants and the others made no difference whatever.

The defendants next contend that the damages awarded by the jury are excessive; that the verdict "was either the result of passion or prejudice on the part of the jury, or their misconception of the evidence and the law as given to them by the court, and was not cured by the remittitur of practically one-half of the verdict."

It is clear from the evidence that the amount of the verdict was not supported by the proof, but we do not think it can be fairly said that this is a case where passion or prejudice played

any part in the assessment of the damages by the jury. The only question to determine is, can the defendants fairly complain of the amount of the judgment entered by the trial court. The defendants admit that the following instruction given to the jury by the court announced the true measure of damages in the case:

"The court instructs the jury that if you believe from the evidence that the defendants failed to construct the building in question according to the plans and specifications, so far as the same has been shown by the evidence, then the measure of the damage is the difference between the value of the building as constructed and the value of the building as it would have been constructed, if it had been constructed according to the plans and specifications except insofar as any of the provisions of the plans and specifications may have been waived by the plaintiffs herein, if any such waiver has been shown by the evidence."

We find from the evidence that the witness Wehrwein, a contractor and builder of twenty years' experience, testified that the difference between the value of the building as constructed, and the value of the building if it had been constructed according to the contracts, was \$2,530. The witness Bishop, an architect of twenty-four years' experience, placed the difference at \$2,535. Both of these witnesses testified for the plaintiff. The defendants did not introduce any evidence, bearing on the question of damages, that was predicated upon the rule that the defendants now concede to be the correct one. The court, in fixing the damages, took the figures of Wehrwein, thus giving the defendants the benefit of the lowest estimate of damages (predicated upon the correct rule), shown by the proof and entered judgment for \$2,530. The defendants, experienced men in the building line, did not see fit to introduce proof to controvert the testimony of Wehrwein. In entering judgment for \$2,530, therefore, the court admittedly followed the true rule of the measure of damages and he accepted the evidence, bearing upon the question, most favorable to the defendants. Under the law and under the proof, the court would not have been justified in entering judgment for a smaller amount.

The defendants next contend that the court erred in admitting the testimony of Mrs. McBride (over their objection) on the ground that she was the wife of Patrick T. McBride and was therefore an incompetent witness. This alleged error is predicated upon the theory that Mrs. McBride was not a proper party to this suit. What we have already said on this question is a sufficient answer to the present contention.

The defendants contend that a certain statement of the trial court was prejudicial to the defendants. While Mrs. McBride was on the stand, the attorney of the plaintiffs said to this court: "With reference to the signatures on the contract, is it necessary to put in any rebuttal?" The court: "This woman testified on direct examination that she had signed that contract." The defendants contend that the statement of the court was not in accordance with the evidence and was prejudicial to the defendants. Without conceding the claim of the defendants that the court misquoted the evidence of Mrs. McBride, it is a sufficient answer to the contention to say that it appears from the record that the defendants made no objection to the statement of the court, nor have they assigned any error on the same.

We have patiently and carefully considered the various contentions of the defendants, and we have referred to all of them in this opinion. On the merits of the case, the defendants are without a defense. They have had a fair trial, and the amount of the judgment is as low as they could possibly ask for, under the evidence and the law in the case. The judgment of the Municipal Court will be affirmed.

AS ORDERED.

19512
410 - 19812

THOMAS W. KELLY,
Appellee,
vs.
FEDERAL IMPROVEMENT COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

1931 A. 20

MR. JUSTICE SWANLAN delivered the opinion of the court.

This is an appeal from a judgment for \$8458, entered in the Municipal Court of Chicago, in an action of the first class, in favor of Thomas W. Kelly, appellee, hereinafter called the plaintiff, against the Federal Improvement Company, a corporation, appellant, hereinafter called the defendant. The plaintiff was an employe of the defendant company, and claims that by the terms of his employment, he was to receive a salary of \$150 per month and 33 1/3 per cent. of the annual net profits of the paving and sidewalk departments of the defendant company. The plaintiff admits that he received from the defendant \$150 monthly, but he claims that the net profits of the said paving and sidewalk departments for the years 1907 and 1908 aggregated \$2918.30; that he had not received any portion of the same; and that in the latter part of June or the early part of July, 1908, at his request, an account stated was entered into between the plaintiff and the defendant, through its treasurer, whereby the annual net profits of the said departments for the years 1907 and 1908 were agreed to be \$2918.30, and that the amount due the plaintiff was agreed to be \$2918.46. The suit was brought, upon an account stated, to recover the said amount, with interest thereon from August 1, 1908.

The defendant has assigned and urged five grounds for a reversal of the judgment. It is only necessary for us to refer to one of these.

The defendant offered to show that the plaintiff and its treasurer, in adjusting and settling the account stated, made a

gross mistake in estimating the earnings of the paving and sidewalk departments for the years 1907 and 1908, and that as a result of this mistake, both parties supposed that the two departments had made net profits for the said years of \$315.30; that as a matter of fact no profits were made by these two departments during the said years, and the defendant contends that the court committed reversible error in excluding the defendant's offer to show that the account stated was the result of the said mistake of fact. It appears from the record that the defendant's statement as to its offer and the action of the trial court in the premises is correct.

The law never binds a party to an account stated that is shown to be unjust and to have occurred by mistake or fraud in the settlement of the same. While it ^{is} the law of this state that where parties after a full and fair opportunity of examining and deciding upon their mutual accounts, have adjusted and settled them, the law will not permit a deliberate settlement thus made to be reopened, except upon the clearest evidence of fraud, or mistake in the settlement, and the burden of proving fraud or mistake rests upon the party asserting the same, still, it is also the law that it is always allowable to show that an account stated was made under a misapprehension of the facts. The defendant had a clear legal right to show, if it could, that the alleged account stated was made by the parties while they were laboring under a mistake of fact as to the actual earnings of the departments in question for the years of 1907 and 1908. If, as a matter of fact, there were no profits made in these two departments for those years, then it is clear that the account stated was the result of a mutual mistake of fact. We are satisfied that the trial court committed reversible error in refusing the defendant an opportunity to prove the offer in question, and the judgment of the Municipal Court of Chicago must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

19883

443 - 18883.

BRIDGET A. COEAS,
Appellee,
vs.
ALBERT I. BOWNELEUR,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

198 I.A. 21

MR. JUSTICE SCANLAN delivered the opinion of the court.

This appeal is prosecuted to reverse a judgment for \$10,000, recovered in the Circuit Court of Cook County by the appellee, hereinafter called the plaintiff, against the appellant, hereinafter called the defendant. The defendant was a practicing physician and surgeon in the city of Chicago, and the suit was brought to recover for the alleged malpractice of the defendant in connection with an operation performed by him upon the plaintiff. The case was tried before a court and a jury, and the defendant has prayed this appeal.

The operation was performed on January 4, 1909. The uterus, the right ovary and tube and a sac on the left ovary were removed; also the appendix. The defendant also repaired tear in the perineum caused by childbirth and removed hemorrhoids. The plaintiff claims that the defendant, during the operation, inserted a certain piece of gauze in the plaintiff's vagina, and that he failed to remove the same, and that he allowed it to remain in the plaintiff's body for a long time (35 days); that he discharged the plaintiff from his care without removing the gauze or causing the same to be removed, and without informing the plaintiff of the presence of the gauze in her body; that as a direct result of the defendant's failure to remove or cause to be removed the gauze, it became rotten and putrid, and the plaintiff's health was seriously injured thereby.

The defendant was the chief surgeon of the Chicago, Milwaukee and St. Paul Railroad Company, and the plaintiff's husband was the chief inspector of the same company, and the plaintiff procured the services of the defendant through her husband. The plaintiff, in accordance with the defendant's orders, was taken to the Monroe Street Hospital in Chicago, on December 31, 1908. The defendant was the president of this hospital and hired and discharged the internes and other attaches connected with the same. The husband of the plaintiff testified that the defendant referred to this hospital as "his own private hospital." The said husband also testified that the defendant agreed to perform the operation and to look after the plaintiff personally after the operation. The defendant testified that he agreed to perform the operation personally, but that nothing was said by either the plaintiff's husband or himself as to the care of the plaintiff after the operation. The defendant performed the operation, assisted by an interne and a house physician connected with the said hospital. The plaintiff remained in the hospital until February 1, 1909, when she was discharged. The defendant admits that he inserted a piece of gauze in the plaintiff's vagina at the time of the operation, but he insists that he removed the same after the completion of the operation. The plaintiff testified that no gauze was ever placed in her body by anyone after the time of the operation. The defendant introduced evidence tending to show that after the operation in question one of the two ~~xxxxxxx~~ ^{ants} ~~xxx assistants~~ in the operation placed gauze in the vagina of the plaintiff while she was in the hospital. It is not disputed that on February 27th, Dr. Hyde removed a piece of gauze from the vagina of the plaintiff, and that the same was putrid and had an exceedingly bad odor. We are satisfied, after a careful examination of the evidence, that the gauze removed by Dr. Hyde on February 27th was

the same that was placed in the vagina of the plaintiff by the defendant at the time of the operation. The theory of the plaintiff is that the defendant agreed not only to perform the operation, but to give the plaintiff his personal care and attention after the operation. The theory of the defendant is that he agreed to give the plaintiff his personal care and attention only as to the operation, and that he is not responsible for any consequences to the plaintiff occurring through a lack of care and attention on the part of others after the operation.

The defendant first contends that "the trial court erred in denying defendant's request, at the conclusion of plaintiff's evidence and at the conclusion of all the evidence, to instruct the jury to return a verdict of not guilty, and in refusing defendant's written instruction when tendered to that effect. Said motion should have been granted and said instruction should have been given, for the following reasons: (1) Plaintiff failed to prove by a preponderance of the evidence that the defendant left the gauze in plaintiff's body; (2) Plaintiff failed to prove that the sicknesses, pain and suffering which she sustained after the operation were caused by the presence of the gauze in her body." As to point 1, it is sufficient to say that where a trial court passes upon a motion for a peremptory instruction the question of the preponderance of the evidence does not arise at all. Libby, McNeill & Libby v. Cook, 282 Ill. 204. As to point 2, we are satisfied that the evidence of the plaintiff tended to prove that the sicknesses, pain and suffering which she sustained after the operation were caused by the fact that the gauze was alleged to remain in her body for an unwarranted period of time.

The defendant next contends that the court erred in giving to the jury, at the instance of the plaintiff, instructions Nos. 6 and 7. These instructions are as follows:

"(5) You are further instructed that if you believe from the evidence that the plaintiff's husband, acting for her, employed defendant to operate upon her, and to give her his personal attention and care after the operation, the defendant accepted such employment, and entered upon the performance thereof, it thereby devolved upon him and became his duty to give her his personal attention and care after the operation, in so far as such attention and care became necessary, as a result of and incidental to such operation. And that if he delegated the duty of caring for and attending to her to others, and such others neglected to give her the attention and care which such operation made reasonably necessary, and that if the plaintiff, without fault on her part, suffered sickness and physical disorders and endured pain and suffering as a result of such negligence in manner and form as charged in her declaration, the defendant still be liable for whatever damage the plaintiff sustained as the direct and inevitable result of such neglect.

"(7) The court instructs the jury that the professional services of a physician and surgeon are of a personal nature, and a physician and surgeon, while he may properly employ and avail himself of the services of assistants and nurses, cannot properly delegate and leave to other persons the performance of the professional services he is employed to render personally to his patient; and if you believe from the evidence in this case that the plaintiff employed the defendant to perform a surgical operation upon her person, and that the defendant employed another person, or delegated to another person a part of the duties devolving upon him, the defendant, personally to perform, in and about the treatment of the plaintiff and the care of her person necessarily incidental to such surgical operation, and that such person so employed by the defendant or so delegated by him to perform such duties, negligently performed such duties, and that as a direct consequence thereof the plaintiff sustained and suffered from such negligent performance the injuries alleged in her declaration, then the defendant in such case would be liable to the plaintiff for the negligent acts, if such there were, of such person to whom he delegated the performance of his personal professional duties."

The defendant claims that these instructions told the jury that, "the defendant was liable for any act performed by one of the house physicians while the plaintiff was in the hospital, even though the doctor was not present at the time such act was performed, and even though such act was not under the direction of Dr. Bouffleur. In other words, the court instructed the jury that the house physicians were the servants of Dr. Bouffleur, and that he would be responsible for any act of negligence on their part." The husband of the plaintiff testified that the defendant agreed to take the plaintiff to his own private hospital and to perform

the operation personally, and to look after the plaintiff. "I asked him if he could perform the operation personally and look after her, and he said 'Yes, I will: sure I will.'" (Testimony of Dr. Cowan.) It is clear therefore that there is evidence in the record tending to prove that the defendant, by special contract, agreed to give to the plaintiff his personal care and attention after the operation had been performed, and instruction No. 6 is predicated upon this theory of the evidence. It states a correct rule of law, and it was proper for the court to give the instruction, under the evidence in the case. Instruction No. 7 states a correct rule of law, and it was proper to give the same under the evidence in the case. 22 American and English Encyclopedia of Law, p. 305; 30 Cyc. of Law and Procedure, p. 1681.

The defendant next contends that the court erred in refusing to give to the jury, at the request of the defendant, the following instruction.

"(2) The court instructs the jury that if you believe from the evidence in this case that some person other than Dr. Souffleur, and not in his presence or under his direction, placed a piece of gauze in the body of the plaintiff, and failed to remove the same, then it is your duty to find the defendant, Dr. Souffleur, not guilty."

This instruction (one that directs a verdict) ignores the evidence as to the alleged special contract by which the defendant was to give his personal attention to the plaintiff after the operation and in connection therewith. The instruction was bad for other reasons.

The defendant next contends that the court erred in not giving to the jury the following instruction, on behalf of the defendant:

"(3) The court instructs the jury that the defendant, Dr. Souffleur, is not responsible or liable for the acts of the internes, resident physicians or nurses of the

Monroe Street Hospital not performed in his presence or under his direction, and if you believe in this case that the negligent act complained of was committed by one of the internes, resident physicians or nurses employed by said Monroe Street Hospital, not in the presence of Dr. Bouffleur nor under his direction, and that such act, if any, was the sole cause of plaintiff's alleged injury, then it is your duty to find Dr. Bouffleur not guilty."

This instruction (one that directs a verdict) is open to the same objection as No. 3, and it was therefore properly refused.

The defendant next contends that the court erred in refusing to give to the jury the following instruction offered by him:

"(1) The court instructs the jury that if they believe from the evidence that the defendant used ordinary skill and care in the treatment of plaintiff, but made a mistake in judgment, then the defendant is not liable for the result of such mistake under the law, and in such event your verdict should be not guilty."

As the claim of the plaintiff was not in any way predicated upon any alleged mistake in judgment on the part of the defendant, this instruction was properly refused. It would have been misleading to give it.

The defendant next contends that the court erred in refusing to give to the jury instruction No. 4 offered by him. This instruction reads as follows:

"(4) The court instructs the jury that even though you believe the piece of gauze referred to in this case was placed in plaintiff's body by Dr. Bouffleur, or by some other person in his presence or by his direction, if you believe from the evidence in this case that the injury testified by plaintiff's witnesses was not caused by the presence in plaintiff's body of said piece of gauze, but was caused by other conditions and circumstances, then it is your duty to find Dr. Bouffleur not guilty."

The subject matter of this instruction was fully covered in other instructions given to the jury at the instance of the defendant.

The defendant next contends that the court committed reversible error in ruling on the admissibility of certain evidence. During the examination of Dr. Stillman, a witness for the plaintiff, the following question was asked by counsel for the plaintiff:

"Supposing a case where gauze is placed in a position such as you found, where the uterus had been removed on the 5th of January, and allowed to remain until the 17th of February, a period of approximately fifty-three days."

The defendant objected to this question and he now claims that the objection should have been sustained "for the reason that the question contains the clause 'such as you found', whereas the evidence shows that the doctor did not find the gauze in plaintiff's body, did not know what position it had been in while there, and did not know the conditions left after the operation." An examination of the record shows that the witness did not make any answer to the above question, and that when the said objection by the defendant was made the question was modified as follows: "Where the gauze was placed in the position where the uterus had been removed, and allowed to remain in that position from the 5th of January until the 17th of February, what would be the probable effect upon the gauze?" The vice of the original question as pointed out by the specific objection as made by the defendant was entirely eliminated by the question as modified, and while the record shows that the defendant objected to the question in its modified form and the witness was allowed to answer over his objection, the defendant makes no point on the ruling of the trial court on his objection to the question as modified, but argues the point as though the original question had not been modified.

The answer of the witness as to the modified question (just referred to) was: "The gauze would be saturated with pus and foul smelling" and in refusing the defendant's motion to strike out this answer, the court made the following remarks: " say say, gentlemen, that I had supposed that there could be no question about ^{what} would be the effect if the situation was as is described; the question would be then, whether it was in that manner and who was responsible for its being there, but that it could remain that length of time in a wound without some decomposition. I suppose that would

practically be conceded." The defendant objected to these remarks, and he now contends that they constitute reversible error. The defendant claims that the jury may have understood that the court was referring to the effect that the leaving of the gauze in the vagina from January 8th until February 27th would have upon the plaintiff's health and that as the defendant was contending that the leaving of the gauze in the vagina for the period stated would not cause any damage to the plaintiff, the remarks were highly prejudicial to him. It is manifest that the modified question asked and the answer made to the same that the court was referring in his remarks (made in passing on the motion to strike out the answer) to the effect that there would be upon the gauze if it was left in the plaintiff's body for the time stated, and as we do not see how it was possible for the jury to have misunderstood the remarks. Counsel for the defendant, as the record shows, interpreted the remarks, at the time they were made, as as to now. The defendant did not contradict the plaintiff's evidence to the effect that the gauze, when taken from the plaintiff's body, was saturated with pus, and was in a putrid and foul smelling condition, nor did the defendant, during the trial, challenge the contention of the plaintiff, that the gauze, if it remained in the vagina of the plaintiff for fifty-three days, would undergo some decomposition. As the court's remarks concerned a subject about which there was no contrariety of opinion, we are unable to see how the defendant could have been injured thereby.

Following the above remarks made by the trial court, occurred the following:

"Q. What effect, doctor, would the presence of gauze in that condition have upon the system?"

"A. There would naturally be more or less absorption from any foreign substance which was saturated with the decomposed, broken down, reparative material in the body constitutionally."

"Q. And, doctor, what effect has such absorption upon the system; how does it manifest itself?"

A. Well, it manifests itself in different ways, from a toxic standpoint, it might be depression."

"Q. You say 'toxic standpoint,' what do you mean by that expression?"

A. Well, when you are absorbing any poison, in any pneumonia, or septicemia, whether it be gas or other septic material, introduced in the human body."

Motions of the defendant to strike out the above answers were denied and this ruling is urged as reversible error, on the ground that the witness did not know of the position of the gauze in the body nor the condition of the plaintiff's body, and that his testimony was given on the presumption that the gauze was in the abdomen. We find no merit in this contention. The witness did not pretend to have any personal knowledge as to the position of the gauze in the plaintiff's body or its condition when removed. He was testifying as an expert as to consequences that would follow from an assumed state of facts.

The defendant next contends that the case should be reversed because of a certain answer made by Mr. Cowan, the husband of the plaintiff, while on the witness stand. The witness in repeating an alleged conversation between the defendant and a Mr. Hinsey, in the presence of the witness, said: "He (referring to Mr. Hinsey) says, 'Did you leave that gauze in that woman?' He (referring to the defendant) says, 'I did, and I regret that, Mr. Hinsey, very much.' Mr. Hinsey says, 'You are insured, are you not?'" The counsel for the defendant, at this point, objected to this statement, and the objection was sustained. No exception was taken by the defendant to the statement or to the ruling of the court. He is therefore in no position to now complain of the statement.

It is next contended by the defendant that "the declaration did not charge the defendant with being negligent through any other person than himself; that it specifically averred that the

negligent acts or omissions were the personal acts and omissions of the defendant, Albert I. Bouffleur, himself;" and that it was error for the court to instruct the jury that the defendant was liable for negligence on the part of others, and that it was also error for the court to refuse to instruct the jury that the defendant was not liable for the acts of negligence of servants or agents, or house physicians, of the hospital. We have previously passed upon the law laid down in the instructions referred to, but the defendant now contends that the said given instructions complained of "were erroneous on the ground that it constitutes a variance from the declaration, and constitutes a case entirely different from that alleged in the declaration." It is not necessary for us to pass upon the merits of the alleged variance, as the defendant has waived whatever right he might have had to insist upon a variance. The defendant did not object to any evidence bearing on the question of his alleged negligence through others on the ground of variance, nor does it appear that he, at any time, in any way pointed out any alleged variance to the trial court. If the defendant desired to avail himself of this objection, he should have objected to the introduction of the evidence when it was offered on the trial, and the variance should have been pointed out, in order that the plaintiff, if she so desired, might amend her declaration. Having failed to do this, the objection of a variance cannot be raised for the first time on appeal. Probst Construction Co. v. Foley, 176 Ill. 31; Jacobs v. Harris, 103 Ill. 533; Illinois Life Ins. Co. v. Bell, 100 Ill. 444; I. C. R.R. Co. v. Schrens, 100 Ill. 37. It appears, therefore, that the defendant accepted as competent the evidence that tended to establish defendant's negligence, through the acts of others, and that he introduced evidence for the purpose of combating the same, it was proper for the court, under such circumstances, to base instructions on this evidence introduced by the

plaintiff, even though such evidence might have been excluded had the defendant objected to the same when offered on the trial. C. & E. I. R.R. Co. v. Randolph, 181 Ill. App. 121; (Aff'd. 199 Ill. 125).

The defendant next contends that the verdict is excessive. We have carefully considered the evidence bearing upon this question, and we have reached the conclusion that we cannot say that the amount of the verdict is manifestly against the weight of the evidence.

Finding no reversible error in the record and believing that the defendant has had a fair and impartial trial, the judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

WILLIAM S. VAN HILDER,
Plaintiff in Error,

vs.

JOHN HAMPER,
Defendant in Error.

ERROR TO

SUPERIOR COURT

COOK COUNTY.

1921 A. 25

MR. JUSTICE SCANLAN delivered the opinion of the court.

This was an action in assumpsit brought in the Superior Court of Cook County, by the plaintiff in error, hereinafter called the plaintiff, against the defendant in error, hereinafter called the defendant, to recover brokerage fees or commissions, alleged to be due to the plaintiff from the defendant for services rendered by the plaintiff as a real estate broker. The declaration contained the common counts and two special counts, and upon motion of the defendant, the plaintiff was required to file a bill of particulars setting out the material facts upon which the action was based. The bill of particulars, as amended, was as follows:

"Plaintiff's claim is for brokerage fees or commissions due the plaintiff from defendant for services rendered by plaintiff as a real estate broker in the matter of an exchange of certain real estate located in Clarke County, Mississippi, for real estate located in the City of Chicago, Cook County, Illinois, and resulting in the execution of a contract between defendant and George H. Lyle on July 18, 1905, and another written contract of September 18, 1905, between said Lyle and defendant relating to said real estate; and also resulting in the acquiring of said Chicago real estate by the defendant and in the procuring of a purchaser of said Mississippi real estate. Amount of commissions, \$5,000. Interest on said \$5,000.

"Plaintiff's claim is also for amount due, on an account stated and an agreement made between plaintiff and defendant at Enterprise, Mississippi, about the month of April, 1906, by which it was agreed between plaintiff and defendant that defendant would pay plaintiff the sum of \$1,800 within ten days, and the further sum of \$1,200 when the said defendant should receive payment of \$20,000 due defendant on certain real estate. Said payments amounting to \$3,000 to be in settlement of the above mentioned claim for commissions."

Defendant filed a plea of non-assumpsit and a special plea setting up the ordinance of the City of Chicago requiring real estate brokers to be licensed, and averring that the plaintiff was not a

licensed real estate broker at the time of the transactions mentioned in the declaration. The plaintiff filed replications to the pleas and the case proceeded to trial before the court and jury. The trial court refused to allow the case to go to the jury on any issue other than that of an account stated, as set forth in the second paragraph of plaintiff's bill of particulars. A verdict was returned in favor of the defendant; a motion for a new trial was overruled; judgment was entered on the verdict, and the plaintiff had sued out this writ of error to reverse the same.

It appears from the evidence that the plaintiff was a real estate broker in the City of Chicago, and that on May 26, 1904, he obtained a license from said City to carry on his business. This license expired April 30, 1905, and the plaintiff failed to renew the same until July 28, 1905. The defendant resided in the State of Mississippi, and during the month of July or August, 1904, he employed the plaintiff as a broker to sell 4,200 acres of land located in said State and owned by the defendant. The efforts of the plaintiff to sell said land resulted in the execution of a contract, dated July 15, 1905, between the defendant and one George T. Lyle, by the terms of which the defendant agreed to exchange the said Mississippi land for certain real estate located on Washington boulevard, in the City of Chicago. This contract of July 15, 1905, was never consummated, and it appears that both parties to the same, as well as the plaintiff, after a certain time, treated the same as null and void.

The plaintiff's theory of the evidence is that, after the contract of July 15, 1905, had been treated by both parties thereto as null and void, and after the license of July 28, 1905, had been issued to him, he renewed his efforts to bring about a sale of the defendant's property; that he induced the defendant to come to Chicago from his home in Mississippi for the purpose of negotiating with Lyle for a new contract to cover the same properties as were involved in the agreement of July 15, 1905; that after the defend-

ant came to Chicago, the plaintiff met him and Lyle in the plaintiff's office, and that as a result of certain negotiations there held, the defendant and Lyle then and there agreed upon the terms of a new and substantially different contract, but one that involve the same properties as were the subject of the agreement of July 15, 1905; that the defendant and Lyle then and there agreed to come to the office of the plaintiff on the following Monday and "close the deal;" that the defendant and Lyle then went to Lyle's home in Michigan where a contract dated September 18, 1905 was executed between them and at the same time deeds, notes and other papers in pursuance of the contract were also executed; that all of the said acts in Michigan were carried on without the knowledge of the plaintiff and for the purpose of defrauding him out of his commission; that by the terms of the contract of September 18, 1905, and as a result of the same, the defendant obtained the Washington boulevard property and Lyle obtained the 6,000 acres of Mississippi land.

The defendant's theory of the evidence is that "there is no evidence in the record showing or tending to show that plaintiff in error performed any service whatever for the defendant in error after July 28, 1905," but that on the contrary the evidence shows that the contract of September 18, 1905, was executed and ^{consummated} ~~xxxxxx~~ without the aid of the plaintiff in any way whatsoever. We find proof in the record tending to support both theories of the evidence.

A number of errors have been assigned and argued by the plaintiff, but in the view that we have taken of this case, it will be only necessary for us to notice one of these. The plaintiff contends that the contract of July 15, 1905, and the services he rendered in connection therewith, may be disregarded entirely, and that nevertheless he would be entitled to recover in this case for the services he rendered the defendant after he (the plaintiff) secured a license on July 28, 1905; that after the latter date, he again brought the parties together, and as a result of his efforts the contract of

September 18, 1906, was made and carried out, and that the trial court erred in allowing the case to go to the jury only on the issue of an account stated.

We are of the opinion that if this theory of the plaintiff was sustained by the proof, he was entitled to recover in this case, and that the trial court erred in refusing to allow the case to go to the jury on any other issue than that of an account stated. At the time of the court's action, the question was not whether the preponderance of the evidence supported the theory of the plaintiff, but whether there was any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find a verdict in favor of the theory of the plaintiff. Libby, McNeill & Libby vs. Cook, 222 Ill. 206. As we have heretofore stated, we are satisfied from an inspection of the record that there is evidence in the case fairly tending to prove the plaintiff's claim, as set out in paragraph one of the bill of particulars, so far as it relates to services rendered after July 29, 1906. The court therefore committed reversible error in allowing the case to go to the jury only as to the claim of the plaintiff as set out in paragraph two of the bill of particulars.

The defendant contends that, even if it be admitted that the plaintiff brought the defendant and Lyle together in the contract of September 18, 1906, nevertheless this contract failed for want of ability on the part of Lyle to perform his part thereof. While it is true that it appears from the proof that Lyle, at the time of the making of said contract, had not title to the Washington Boulevard property, nevertheless there is evidence tending to prove that he had a right to demand that the said property be deeded to himself or to any one else whom he might designate, and it further clearly appears that Lyle actually procured the delivery of said property to the defendant and received in exchange therefor the property mentioned in the contract as belonging to the defendant. Under

the circumstances, if the jury believed the evidence of the plaintiff on this subject, they would have been warranted in finding that Lyle was ready, able and willing to carry out his part of the contract of September 18, 1905.

For the error above indicated, the judgment of the Superior Court of Cook County will be reversed and the cause remanded.

REVERSED AND REMANDED.

ESTELLE HILTON,
Defendant in Error,
vs.
THEOPHILIS B. HILTON,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT
COOK COUNTY.

103 I.A. 28

MR. JUSTICE SCANLAN delivered the opinion of the court.

This is a bill for separate maintenance filed by the defendant in error, hereinafter called the complainant, in the Superior Court of Cook County, against her husband, the plaintiff in error, hereinafter called the defendant. The defendant filed an answer to the complainant's bill and also filed a cross-bill praying for a divorce from the complainant. The complainant answered the defendant's cross-bill, and the cause was heard by the Chancellor, without a jury, on the bill and answer and the cross-bill and answer and the proofs taken in the cause. A decree for separate maintenance was entered by the court in favor of the complainant, and the defendant's cross-bill was dismissed for want of equity. To reverse a part of this decree the defendant has prosecuted this writ of error.

The record in this case does not contain a certificate of evidence. The certificate of the clerk of the court, attached to the transcript of the record, recites that the transcript is complete, except certain orders, affidavits, appearances, substitutions, stipulations and notices.

The defendant contends that the part of the decree granting separate maintenance to the complainant should be reversed, for the reason that the complainant has failed to preserve in the record a certificate of the evidence upon which the decree was entered, and that the decree itself does not make findings of specific facts sufficient to support the same. It is a well settled rule

in this state that the party in whose favor a decree granting relief is entered, to maintain it, must in some way preserve the evidence, by a certificate of evidence or otherwise, or the decree must find specific facts, that were proven on the hearing, sufficient to support such decree. This duty does not devolve upon the party against whom such decree is rendered. Ohman v. Ohman, 235 Ill. 632; Berg v. Berg, 228 Ill. 209; Buetter v. Glos, 240 Ill. 6; Tronchard v. Tronchard, 245 Ill. 313.

The decree in the case at bar merely found "that the allegations in the said bill contained are true, as therein stated; and that the equities of this cause are with the complainant." There are no findings of specific facts set out in the decree. In the case of Ohman v. Ohman, supra, the decree ~~XXXXXXXXXXXXXXXXXXXX~~ ~~XXXXXXXXXXXX~~ was exactly similar to the one in the case at bar. In that case it was held that such^a general finding, where the evidence was not preserved in the record, would not sustain a decree granting relief. We think the rule laid down in the cases cited is clearly applicable to the case at bar, and we must therefore hold, that the findings in the decree in the present case are not sufficient to sustain the order granting separate maintenance to the complainant.

The complainant contends that the decree should be sustained because the certificate of the clerk of the court showed that the transcript of the record is not complete, in that certain orders, affidavits, appearances, substitutions, stipulations and notices were omitted therefrom. The complainant argues that the affidavits omitted from the transcript might have been used as evidence on the trial of the cause, by stipulation, and that therefore, the presumption is that the decree is correct and regular. Certain cases are cited in support of this contention, but none of these, in our judgment, applies to a case like the one

before us. In the case of Berg v. Berg, supra, the transcript of the record was not complete, in that some fourteen documents and also the orders in the case on the answers, replications and attachments, were omitted therefrom, and yet the court held in that case that the complainant, in order to sustain her decree as to separate maintenance, was obliged to preserve the evidence by a certificate of evidence or to have the decree recite specific facts that were proven on the hearing sufficient to support the decree. We think the contention of the complainant is without merit.

The defendant has not complained of the court's action in dismissing his cross-bill out of court, and no error is assigned upon the action of the court in this regard. Therefore, that part of the decree of the Superior Court of Cook County that dismisses defendant's cross-bill out of court, will be affirmed; but that part of said decree that grants separate maintenance to the complainant, for the reasons indicated, will be reversed and the cause remanded.

AFFIRMED IN PART AND REVERSED
AND REMANDED IN PART.

104 - 20143.

CITY OF CHICAGO,

Defendant in Error,

vs.

EVA G. MORAN,

Plaintiff in Error.

REVENUE TO

MUNICIPAL COURT

OF CHICAGO.

192 I.A. 57

MR. JUSTICE SCANLAN delivered the opinion of the court.

Eva G. Moran, the plaintiff in error, was found guilty in the Municipal Court of Chicago of a violation of section 1539 of the Chicago Code of 1911, and a fine of \$25 was assessed against her. Judgment was entered on the finding and this writ of error followed. The complaint charged that the plaintiff in error, on November 27, 1913, at the City of Chicago, "did then and there sell and give away malt, spirituous and intoxicating liquor in quantities of less than one gallon, to be drunk upon the premises within the limits of the city, said premises being situate at 1511 North LaSalle avenue, in violation of section 1539 of the Chicago Code of 1911." The plaintiff in error waived a jury trial and the case was tried by the court, without a jury.

The plaintiff in error contends that the record fails to show that the plaintiff in error violated the alleged ordinance, charged in the complaint, for the reason that the alleged ordinance is not incorporated, in any way, in the record. It appears that section 1539 of the Chicago City Code is not set out in the transcript of the record, and it is referred to by number only in the complaint. It was not offered in evidence nor read to the court so far as the record in this case discloses. Section 54 of the municipal court act requires the trial court to take judicial notice of all general ordinances of the City of Chicago, and as the record before us fails to show that he did not do so, we must presume that he did. "It was the duty of the plaintiff in

error to prepare and submit a document containing such facts as were before the trial court, and were considered by it, in making any ruling which is sought to be reviewed, whether such facts were offered in evidence or were only considered in evidence under the rule of judicial notice obtaining in the Municipal Court. Manifestly, therefore, if he omits from the statement, thus prepared by him and signed by the trial judge, any matter or thing necessary to enable this court to determine whether the ruling of the trial court was correct, in view of all the evidence then before it, the correctness of such ruling is not properly before us for review. In such case, it is our duty to presume that the facts omitted were sufficient to justify the ruling of the trial court." City of Chicago v. Tourney, 187 Ill. App. 441. We must assume, therefore, that the trial court was justified in finding that the proof in this case showed a violation by the plaintiff in error of section 1830, as charged in the complaint in this case.

The plaintiff in error next contends that the prosecution should fail because the case was one in which the process should have been had by summons. There is no merit in this contention. In a suit by a city to recover a penalty for the violation of an ordinance, process may properly be had by a summons or by a warrant or by arrest on view. It appears that the plaintiff in error appeared before the court, waived a jury trial, and by agreement between the plaintiff in error and the defendant in error, the case was submitted to the court for trial without a jury, and there is no question but what the Municipal Court had jurisdiction of the person of the defendant.

Plaintiff in error next contends that the proof fails to show the year in which the alleged violation of the ordinance took place, and that therefore the presumption is that the prosecution is barred by the statute of limitations, or that the alleged offense

was committed after the filing of the complaint in the case. There is no merit in this contention. When all of the facts and circumstances in evidence are considered together, it is quite plain that the alleged sale by the plaintiff in error took place on the night of November 27, 1918. It is only necessary to refer to a few of the facts in evidence to show the correctness of our conclusion in this regard. The prosecuting witness testified that after he purchased the bottle of beer and the two glasses of whisky, he took the same from the hotel of the plaintiff in error to the police station, where he left them, and that the next time that he saw them was the following morning at the branch of the Municipal court presided over by Judge Hopkins. It further appears from the record that the prosecuting witness appeared before the said judge on November 28, 1918, and presented to the said court the complaint that was filed against the plaintiff in error in this case.

The plaintiff in error next contends that the court "took judicial notice that a certain bottle not in itself a standard of measure, and certain glasses not of themselves standard and none of which were introduced in evidence, held less than a gallon in each instance." The evidence of the prosecution was to the effect that the plaintiff in error sold to Police Officer Lery a bottle of beer and two glasses of whiskey in certain premises conducted by the plaintiff in error at 1811 LaSalle Avenue, Chicago. A bottle of beer and two glasses were produced by the prosecution during the examination of Officer Lery, and he testified that they were the same as he had received from the plaintiff in error, and the counsel for the city offered to prove that the bottle would hold less than a gallon, and that the two glasses would each hold less than a gallon. The court stated that the bottle and glasses were before him, and that he would take "judicial notice" that the bottle would hold less than a gallon and that the glasses would each hold less than a gallon. In effect, the court stated that he was able to de-

teraine, as a matter of fact, from an inspection of the bottle and the glasses that none of them could hold a gallon. Counsel for the plaintiff in error made no objection to the court's action in the premises, nor did he attempt in any way to disprove the court's conclusion as to the capacity of the bottle and the glasses. Moreover, as the ordinance upon which the prosecution is based is not in the record, we are unable to say that the capacity of the bottle or the glasses was a material inquiry in the case.

It is next contended by the plaintiff in error that the proof fails to show that the bottle of beer and the two glasses of whiskey that were introduced in evidence were the same that were sold to the prosecuting witness by the plaintiff in error. While it is entirely unnecessary for the prosecution to introduce the said articles in evidence, nevertheless, we think the identity of the articles introduced was sufficiently proven. We find from the record that the prosecuting witness claimed that he bought and received from the plaintiff in error a bottle of beer and two glasses of whiskey, and the plaintiff in error testified that she gave the prosecuting witness a bottle of beer and two glasses of whiskey for nothing; that he gave her \$5 at the time she gave him the beer and whiskey, but that this sum was paid her for a room in her premises.

The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

WILLIAM O. SEATT,
Plaintiff in Error,

vs.

CITY OF CHICAGO, (impleaded with
the Illinois Tunnel Co., a cor-
poration),
Defendant in Error.

APPEAL TO

ILLINOIS COURT

COOK COUNTY.

1921 A. 59

MR. JUSTICE SCAGLAN delivered the opinion of the court.

William O. Seatt, plaintiff in error, hereinafter called the plaintiff, sued the City of Chicago, defendant in error, hereinafter called the defendant, and the Illinois Tunnel Co., a corporation, in the Circuit Court of Cook County, in an action of trespass on the case, alleging damages in the sum of \$50,000. To an amended declaration filed by the plaintiff, each defendant filed a separate general demurrer. The defendant, Illinois Tunnel Co., was afterwards given leave to withdraw its demurrer and to file certain pleas to the declaration. The demurrer of the defendant, City of Chicago, was sustained by the trial court, and the plaintiff electing to stand by its declaration as to the defendant, City of Chicago, the suit as to the last named defendant was dismissed and a judgment for costs, in favor of the said City and against the plaintiff, was entered. The plaintiff excepted to this action of the trial court, and prayed an appeal from the said judgment and afterwards, on February 28, 1914, filed this writ of error in this court. The plaintiff assigned as error: First, that the court erred in sustaining the demurrer of defendant, City of Chicago, to the amended declaration of the plaintiff; and second, that the court erred in dismissing the suit of the plaintiff as to the City of Chicago, and in awarding said City a judgment for costs. After the writ of error had been filed in this court, the defendant, City of Chicago, on May 28, 1914, entered a motion to dismiss the said writ upon the ground "that the order or judgment,

to reverse which the said writ had been sued out, was not such a final order or judgment as could properly be appealed from or reversed on error." The contention of the said defendant was that there had not been a final disposition of the case as to all the parties, and that the cause could not be reviewed as to one party at one time and another party at another time. The motion to dismiss was opposed by the plaintiff, and on June 4, 1914, an order was entered reserving judgment on the said motion to the final hearing of the case. On June 18, 1914, the cause was taken by this court, and at the same time an order was entered extending the time for the plaintiff to file an abstract and brief in the case to July 3, 1914.

We find that the plaintiff has not filed any abstract or brief in the case and has apparently abandoned the writ of error. Under the rules of this court, the said writ must be dismissed for want of prosecution because of a failure by the plaintiff to file an abstract and brief within the time allowed.

WRIT OF ERROR DISMISSED FOR WANT OF
PROSECUTION.

J. E. LEVINSON and Wm. KAMIN,
Defendants in Error,

vs.

J. E. FISLER,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1921 A. 60

MR. JUSTICE SCANDAL delivered the opinion of the court.

J. E. Levinson and William Kamin, defendants-in-error, hereinafter called the plaintiffs, on November 23, 1913, obtained a judgment by confession against J. E. Fiesler, plaintiff in-error, hereinafter called the defendant, for \$81, in the Municipal Court of Chicago. The suit was brought upon a lease containing the usual confession of judgment clause for rent due under the lease; also a clause providing for \$25 attorneys' fees in case of judgment by confession. The lease fixed the rent due per month at \$50. The plaintiffs' statement of claim alleged that the defendant owed the plaintiffs the rent for the premises in question for the month of November, 1913, less a rebate of \$4, making the amount due for rent \$56; and also \$25 for attorneys' fees. On December 17, 1914, the defendant filed a motion to have the said judgment "opened up" and to allow the defendant to plead. In support of the said motion, an affidavit of the defendant was introduced. In this affidavit, the defendant alleged that the plaintiffs did not keep the said premises "in a good and comfortable and habitable condition, but on the contrary did not provide a heat and temperature of to exceed, to-wit., 43 degrees, during the cold weather period covered by the time for which judgment herein has been confessed. * * * Because of said facts defendant was evicted from said premises upon divers occasions, and was obliged to seek refuge in the hospitality of friends having warmer and more comfortable quarters;" and the defendant further alleged

that he had been ready and willing to comply with all the terms and conditions of the said lease obligatory upon him, "including the payment of the said rent until evicted as aforesaid."

The trial court denied the motion of the defendant, and this writ of error followed.

The defendant contends that the trial court erred in overruling the said motion and in "refusing to allow the defendant leave to recoup his matters of defense to the whole or a portion of the plaintiffs' demands herein;" that the defendant showed a substantial breach by the plaintiffs of one of the express covenants of the lease, namely, the one relating to the heating of the premises in question; that the defendant had the right to recoup or set off against the demands of the plaintiffs the damages sustained by the defendant by reason of the said breach; that the defendant was not obliged to vacate the premises because of the said breach of the plaintiffs; that said breach tended merely to reduce the beneficial enjoyment of the premises and did not release the defendant from his liability for the rent because he continued to occupy the premises, and that under the circumstances of the case, he had the right to recoup in the present action such damages as he had sustained by reason of the said breach.

After carefully considering the affidavit filed by the defendant, we have reached the conclusion that the trial court did not err in denying the defendant's motion to open up the judgment and to allow him to plead. The material allegations in the affidavit are of the most general character, and were to the effect that the beneficial enjoyment of the premises by the defendant was, "upon divers occasions" diminished. Neither the number, nor the duration of the different occasions complained of, is stated; and the defendant fails to state with any certainty the temperature of the premises at the times when, he alleges, that

the plaintiffs "did not provide a heat and temperature of to exceed, to-wit., 48 degrees." Nor is it alleged that the rental value of the premises was reduced by reason of the alleged wrongful act or omission on the part of the plaintiffs. In fact, there is nothing in the allegations in the affidavit to show that the alleged wrongful acts or omissions were not of the most trifling character. Moreover, it appears that the lease contains a provision that the plaintiffs shall not be liable in damages for not furnishing heat, when the failure to furnish the same was caused by unavoidable delay or inability to secure fuel, and there is no allegation in the affidavit that the alleged failure to furnish proper heat on the occasions in question was not due to unavoidable delay or inability on the part of the plaintiffs to secure fuel. In our judgment, the defendant failed to show, by his affidavit, any equitable reason why his motion should be granted. For the reasons stated, the judgment of the Municipal Court of Chicago will be affirmed.

APPROVED.

D. GREENEBELD,)	
Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
CHICAGO CITY RAILWAY COMPANY,	)	OF CHICAGO.
Plaintiff in Error.)	

1921 A. 62

MR. JUSTICE SCARLES delivered the opinion of the court.

B. Greenebeld, defendant in error, hereinafter called the plaintiff, recovered a judgment for \$125 in an action of the Fourth class in the Municipal Court of Chicago, against the Chicago City Railway Company, plaintiff in error, hereinafter called the defendant. This writ of error is sued out by the defendant. The plaintiff's statement of claim, as finally amended, avers that the plaintiff's claim is for the value of a horse owned by the plaintiff, "which was injured on or about December 12, 1912, on Western avenue, near Erie street, in the city of Chicago, and as a result of the said injury, it became necessary to kill the said horse. Plaintiff alleges that the said injury occurred as a result of the negligence of the agents and servants of the defendant and that before and at the time of the said injury, the servant of plaintiff who was in control of the said horse was in the exercise of ordinary care: plaintiff alleges that the reasonable value of said horse was \$2000.00." To this statement of claim, the defendant filed an affidavit of merits, denying that it was guilty of the negligence charged.

The defendant contends that the court erred in not directing a verdict for the defendant, for the reason that the evidence does not show that the defendant was negligent, and that it does show that the driver of the plaintiff did not exercise ordinary care and caution for the safety of the plaintiff's property at the time of the accident.

After a careful reading of the record in this case, we have reached the conclusion that the judgment must be reversed, for the reason that we are unable to determine with any certainty, from the evidence in the case, exactly where and how the accident in question occurred. The counsel for the plaintiff admits that the testimony on important points "looks like an enigma," but he contends that the court reporter who made up the bill of exceptions for the defendant made mistakes in taking the evidence, and that he (counsel for the plaintiff), neglected to carefully examine the bill of exceptions before he C.A.'d the same, for the reason that he is a busy lawyer and the amount of the judgment was small. The statement of the counsel fails to aid this court in its effort to ascertain and determine the facts in the case.

For the reasons stated the judgment of the Municipal Court of Chicago will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

244 - 24193.

MARY L. PEASLER,
Appellee,
vs.
EDITH TENLEY MORTON,
Appellant.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

1931 A. 63

MR. JUSTICE MCARDLE delivered the opinion of the court.

This appeal is brought to reverse a judgment in assumpsit for \$190 entered in the County Court of Cook County in favor of the appellee, Mary L. Peasler, hereinafter called the plaintiff, and against the appellant, Edith Tenley Morton, hereinafter called the defendant. The case was tried before a court and jury. The jury returned a verdict finding the issues in favor of the plaintiff and assessing the damages at \$300. The following bill of particulars was filed in the case:

"Bill of particulars: This action is brought to recover, viz: For services performed by plaintiff for defendant, at her request:

1909	) Fifteen (15) trips to Mr. Trainer's	
1910	) office at Five Dollars (\$5.00)	
1911	) per trip	\$75.00
Dec.	) Six (6) days at Salesburg, Illinois	
1910	) at request of defendant, at Twenty-	
	) five Dollars (\$25.00) per day	150.00
Feb.	) Fifteen (15) days at Salesburg,	
1911	) Illinois, at request of defendant,	
	) at Twenty-five (\$25.00) Dollars per	
	) day	375.00
May	) Six (6) days at Janesville, Wisconsin,	
1911	) at request of defendant, at	
	) Twenty-five Dollars (\$25.00) per day	150.00
Mar.	) Twenty (20) professional calls at	
Apr.	) 1911) request of defendant, at	
May	) Two Dollars (\$2.00) per call	40.00
		<u>\$760.00</u>

introduced evidence only
On the trial the plaintiff ~~introduced evidence only~~ as to
the following items of the bill of particulars:

Ten (10) trips to Mr. Trainor's office at Five Dollars (\$5.00) per trip.	\$50.00
Sixteen (16) days at Galesburg, Illinois, at request of defendant, at Twenty-five (\$25.00) per day.	400.00
Four (4) days at Janesville, Wisconsin, at request of defendant, at Twenty-five (\$25.00) per day.	100.00
Fifteen (15) professional calls at request of defendant, at Two Dollars (\$2.00) per call.	30.00
	<u>\$580.00</u>

All of the above items of the plaintiff's claim were submitted to the jury, although the defendant contended that it was improper to submit the "Galesburg claim" item to the jury for the reason that the alleged contract relating to the same was against public policy and void. On the motion for a new trial, the trial court assumed that the jury by its verdict of \$500 allowed the plaintiff \$400 for the "Galesburg claim" item and \$100 for the "Janesville claim" item and disallowed the other two items of the plaintiff's claim, and the court held that it was error to submit the "Galesburg claim" item to the jury for the reason that the alleged contract between the plaintiff and defendant in reference to the "Galesburg claim" was against public policy and void, and the court stated that if the plaintiff would remit \$400 from the amount of the verdict, he would overrule the defendant's motion for a new trial and enter judgment for \$100, and over the objection of the defendant, the plaintiff was allowed to enter a recitatur for \$400 and thereupon the motion for a new trial was overruled and judgment was entered in favor of the plaintiff for \$100,

The defendant contended in the lower court and contends here that the court had no right to allow a judgment for \$100 for the "Janesville claim" item, for the reason that it was impossible for the trial court to determine how the jury arrived at their verdict of \$500, and that the trial court might be allowing

the plaintiff a judgment for an item that had been disallowed by the jury. We do not think there is any merit in this contention of the defendant. From the items of the plaintiff's claim and from the amount of the verdict, the trial court was able to determine with reasonable certainty that the jury by their verdict had allowed the plaintiff \$600 for the "Janesburg claim" item and \$100 for the "Janesville claim" item. The defendant cites the case of Leuth v. Chicago Union Traction Co., 244 Ill. 314, 315, in support of her present contention. That case is not an authority for the defendant's present contention.

The defendant also contends that the verdict and judgment are manifestly against the weight of the evidence. We find this contention to be without merit. The plaintiff (a physician and a resident of Chicago) and one other witness testified that the defendant agreed to pay the plaintiff \$25 a day for the time the plaintiff would be compelled to spend as a witness in the "Clarke-Fenley-Borton case" in Janesville, Wisconsin, and the plaintiff testified that in going to, attending upon and returning from the trial in question, four days were used. The defendant denied the alleged agreement. The jury and the trial court saw the witnesses and had a far better opportunity than we to pass upon their credibility, and we are satisfied that we cannot say that the finding of the jury, so far as it relates to the "Janesville claim" item is manifestly against the weight of the evidence; nor can the judgment be said to be against the weight of the evidence. The defendant also contends that the evidence of the plaintiff proves that she was compelled to use only two days instead of four in the Janesville matter. When all the evidence of the plaintiff is considered together, we think the defendant's interpretation of the same is not a reasonable one. As we read her testimony, she spent four days in going to, attending upon and returning from the trial. She

defendant testified as a witness in her own behalf and she did not attempt to dispute the plaintiff's claim that she was compelled to spend four days in the Janesville matter.

The judgment of the County Court of Cook County will be affirmed.

AFFIRMED.

312 - 20347.

T. BETTE,
Defendant in Error,
vs.
MILLIE POPE,
Plaintiff in Error.

APPEAL TO
MUNICIPAL COURT
OF CHICAGO.

1921.A.66

MR. JAMES H. SWANLAN delivered the opinion of the court.

T. Bette, the defendant in error, hereinafter called the plaintiff, brought suit in the Municipal Court of Chicago Against Millie Pope, plaintiff in error, hereinafter called the defendant, for the sum of \$137.50. In plaintiff's statement of claim it is alleged that the claim was, "for the sum of \$137.50 commissions due as a real^{estate} broker for procuring a purchaser ready, willing and able to buy the real estate owned by the defendant and known as number 2431 Warner Avenue, Chicago, Illinois, for the purchase price of \$5500.00. Plaintiff states that the usual and customary charge in the City of Chicago, for improved property made by real estate brokers is 2 1/2% of the sale price and that he is therefore entitled to 2 1/2% of \$5500.00 as his commission. Plaintiff states that he is a duly licensed real estate broker in the City of Chicago and that he has often requested the said defendant to pay his commission which the defendant has refused to do and therefore he brings suit." The defendant filed an affidavit of merits in which she denied that the plaintiff procured a customer ready, willing and able to buy the real estate in question for the purchase price of \$5500 or any other sum, and alleged "that the property was sold through the agency and efforts of a person other than the plaintiff." The case was tried by the court without a jury, and the issues were found against the defendant, and the plaintiff's damages were assessed at the sum of \$31.87; judgment was entered for that sum, and this writ of error followed.

The defendant admits that she listed the property in question with the plaintiff to sell for \$5500, but she contends that the evidence fails to prove that the plaintiff produced a purchaser ready, able and willing to buy the premises at the terms proposed by the defendant. We have carefully read the evidence in the case, and we are satisfied that the plaintiff made out a clear prima facie case, and while the evidence for the defendant rebuts the case made out by the plaintiff, yet, we cannot say that the finding of the trial court on the issues is manifestly against the weight of the evidence.

It was not disputed by the defendant that if the plaintiff were entitled to recover at all, his commission should be $1\frac{1}{2}\%$ of \$5500, or \$137.50, the amount for which the plaintiff sued. The plaintiff contends that the action of the trial court in entering judgment in his favor for \$91.37 instead of \$137.50, was an arbitrary one and wholly unwarranted by the evidence, and the plaintiff has assigned cross-error thereon, and he asks this court to reverse the judgment of the lower court and to enter judgment here for the plaintiff for \$137.50. It appeared from the proof that the plaintiff, at one time prior to the commencement of the suit, stated that he was willing to accept two-thirds of the amount that he was entitled to for commission, if his claim were settled, but this offer of the plaintiff was never accepted by the defendant, and the evidence bearing on the offer of compromise was incompetent, and should not have been considered by the court in assessing the plaintiff's damages. The court, however, after finding the issues for the plaintiff, stated, that because the plaintiff had offered on one occasion to settle his claim for two-thirds of the commission he was entitled to, he would fix his damages at \$91.37 instead of \$137.50. This action of the court was clearly unjustified, and the judgment of the lower court must therefore be reversed; but, inasmuch as there is no dispute as to the amount of the commission

the plaintiff is entitled to recover, if he is entitled to recover at all, there is no reason for remanding the cause.

The plaintiff claims that he was compelled to file an additional abstract of the testimony in the case at an expense of \$8.85, and he has asked this court to tax the said amount as a part of the costs of the suit. An examination of the additional abstract filed by the plaintiff shows that it contains an abstract of a certain alleged statement of facts, which is not, in fact, a statement of facts in the case, and has no proper place in the record. The real statement of facts in the record is a very short one and is in narrative form, and we do not think that it was necessary for the plaintiff to file the additional abstract. The motion of the plaintiff to tax the expense of the additional abstract as costs will therefore be denied.

For the reasons stated the judgment of the Municipal Court of Chicago will be reversed and judgment will be entered here in favor of the defendant in error, (plaintiff below) and against the plaintiff in error (defendant below) for \$137.50 and costs, with execution.

REVEREND AND HONORABLE COURT.

Finding of facts to be incorporated in the judgment:

We find that S. Dette, defendant in ^{error} here, plaintiff below, a real estate broker, at the instance and request of Millie Pope, plaintiff in error here, defendant below, procured a purchaser for defendant's property, to whom the defendant sold it, and that the value of the plaintiff's services in that behalf is the sum of \$137.50, which sum defendant refused to pay on demand.

SIMON SLEPH, JACOB SANDROWITZ and
ABE WOLDBLATT, co-partners doing
business under the firm name and
style of SLEPH, SANDROWITZ & WOLD-
BLATT,

Plaintiffs in Error,

vs.

S. GROSSMAN, JOE GROSSMAN and S.
WEINBERG, doing business as GROSS-
MAN BROS.,

Defendants in Error.

381
SUBJECT TO

MUNICIPAL COURT

OF CHICAGO.

1921.A. 67

STATEMENT OF THE CASE. This is an attachment suit instit-
uted in the Municipal Court of Chicago by Simon Sleph, Jacob
Sandrowitz and Abe Woldblatt, co-partners doing business under
the firm name of Sleph, Sandrowitz & Woldblatt (hereinafter re-
ferred to as plaintiffs), against S. Grossman, Joe Grossman and
S. Weinberg, doing business as Grossman Brothers (hereinafter
referred to as the defendants). The affidavit for attachment
upon which the writ was issued was filed on the 27th day of May,
1913, the ground for attachment being non-residence of the defend-
ants. On the same day plaintiffs caused to be served as garnishees
the Woodrich Transportation Company, which filed its answer on
June 7th, stating that it had certain property in its possession
belonging to the defendants. Thereafter steps were taken to ob-
tain service on the defendants by publication. On June 17th de-
fendants entered a special appearance by their attorneys, solely
for the purpose of moving to quash the writ of attachment, which
motion, however, was overruled; and on the same day leave was
granted plaintiffs to file an amended affidavit of attachment in-
stantly, which was done and an order entered upon the defendants to
file an affidavit of merits within ten days. This amended affidavit
of attachment stated that the defendants were indebted to the plain-
tiffs in the sum of \$548.13, being an overpayment on a draft drawn
by defendants upon the plaintiffs; and attached to said affidavit,
and made a part thereof, was a detailed statement showing how this
amount was arrived at.

On July 29th defendants filed an affidavit of merits and claim of set-off. This affidavit was sworn to by Frank Grossman, a member of the defendant firm. Therein he denied that the defendants were in any wise indebted to the plaintiffs, and furthermore set forth affirmatively that the plaintiffs had promised to pay the defendants the sum of \$1957.82, and that after allowing plaintiffs credit for the payment made, there was a balance still due of \$140.79. By leave of court, this affidavit was withdrawn and an amended affidavit of merits and claim of set-off was filed, which simply went into greater detail regarding the transactions between the parties.

To this amended affidavit of counterclaim and set-off plaintiffs were ordered to file an affidavit of merits, which they did on August 22, 1913. On the trial of the case before the court without a jury, on September 24th, evidence was introduced by the plaintiffs tending to support their statement of claim. At the conclusion of plaintiffs' case, among the motions made by the defendants was one to quash the attachment on the ground that the plaintiffs' testimony showed that their claim rested in unliquidated damages and consequently could not be made the basis of original attachment proceedings; which motion was overruled by the court. Defendants then proceeded to put in evidence in denial of plaintiffs' claim and in support of their affidavit of merits and claim of set-off.

On November 22nd the court, after having had the case under advisement since September 30th, dismissed the suit for want of jurisdiction of the subject matter, at plaintiffs' costs; ordered the garnishee discharged; and entered judgment against the plaintiffs for costs, - from which judgment plaintiffs have sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court.

Plaintiffs complain: (1) That the court erred in finding that the said attachment suit was to recover unliquidated damages; and (2) that the defendants, by filing an affidavit of merits and claim of set-off to the plaintiffs' statement of claim, after the court had overruled their motion to quash the writ of attachment, not only entered their general appearance, but asked for affirmative relief, and in so doing, submitted themselves to the jurisdiction of the court for all purposes; moreover, that they further confirmed the jurisdiction of the court by introducing evidence in support of the affidavit of merits and their claim of set-off, after the ^{court} had refused at the close of plaintiffs' case to dismiss the suit for want of jurisdiction because the claim was for unliquidated damages; that notwithstanding the court was of the opinion that plaintiffs' claim was for unliquidated damages and therefore not the subject matter of an original attachment proceeding, defendants having asked the court to take affirmative action, the court was bound to disregard the nature of the damages and proceed to hear all the matters in controversy in an action of assumpsit.

To this the defendants reply: (1) That the case having been tried without a jury, no questions of review were preserved by the record because of the failure of plaintiffs to submit propositions of law; (2) that the court was correct in finding that the damages sought to be recovered in the attachment suit were unliquidated; and (3) that the filing of the affidavit of merits and claim of set-off, and the proceeding to trial upon the merits did not confer general jurisdiction upon the court to proceed in assumpsit.

The record comes to this court in the form of a stenographic report, certified to by the trial court as being a correct stenographic report of the proceedings of the trial of the case,

and a correct statement of such other proceedings in said cause as said parties desire to have reviewed.

The record shows that defendants' motion to quash the writ of attachment was overruled, and that upon leave being given to file an amended affidavit of attachment instantly, defendants were ruled to file an affidavit of merits within ten days. Defendants filed not only an affidavit of merits but also a claim of set-off. Although this was withdrawn and another substituted, yet when the case went to trial there was an affidavit of merits and claim of set-off on file, and an affidavit of merits filed on behalf of the plaintiffs in reply to defendants' claim of set-off.

At the conclusion of all the evidence, the court ordered the suit dismissed for want of jurisdiction of the subject matter.

This action of the court was tantamount to granting defendants' motion made at the close of the plaintiffs' case, and the court, in arriving at that conclusion, acted upon the theory that the plaintiffs' action was to recover unliquidated damages, for which an original attachment proceeding would not lie.

The amended affidavit of attachment stated clearly that defendants were indebted to plaintiffs in a certain definite sum; in fact, no question could arise on the face of the affidavit that the claim was for liquidated damages.

The record in this case shows that plaintiffs were doing business in the city of Chicago, while defendants' place of business was in Milwaukee, Wisconsin. Both were engaged in dealing in old metals such as brass, tin foil, tubing, radiators, etc. On March 4, 1913, a representative of the plaintiffs purchased on their behalf, from defendants at Milwaukee, certain material, consisting, among other things, of red brass, borings, tubings, radiators, etc. A memorandum of the agreement entered into and signed by both parties was made an exhibit in the case. At the time the agreement was en-

tered into, plaintiffs deposited \$25 with defendants. There is practically no dispute in the evidence with reference to the negotiations leading up to the purchase of this material and the entering into of the contract.

At the same time, negotiations were entered into with reference to the purchase of some old tin foil. As to this transaction, Henry A. Laun, who represented plaintiffs therein, testified: that the tin foil was kept in a number of barrels in a shed; that as the contents of the barrels could not be seen, Frank Grossman of defendants' firm took out a piece of the tin foil, handed it to him, and stated that it was a sample of what the barrels contained, designating it as "tin foil and paper," a well known term in the secondhand metal business; that he stated that he wished to take the sample back to Chicago to have it assayed, and would then submit a proposition for the purchase of the tin foil; that the sample was taken by him to Chicago, an assay made by plaintiffs; that the assay showed that the tin foil and paper, as per sample, would run about 40 per cent. pure tin foil; that the value of pure tin foil was 41-1/2¢ per pound; and that upon that basis he submitted to Frank Grossman by telephone, an offer of 11¢ per pound, which offer, after some negotiations, was accepted.

Plaintiffs also introduced a letter in evidence in corroboration of this agreement, which was as follows:

"Chicago, Mar. 3, 1913.

Grossman Bros. & Co.,
Milwaukee, Wis.
Gentlemen:

Confirming telephone conversation today we have bought and you have sold about 3 ton of foil with paper at 11 cents per pound; this you may put in car with other material purchased by our Mr. Laun. You may load car on either the C.M.&St.P. R.R. or C.&N.W. Ry., and consign the same to 18th & Jefferson Sts., Chicago, Ill.

Trusting you will load the same as soon as possible, we remain,

Yours truly,

Sleph, Sandrowitz & Goldblatt,
By. A. Goldblatt.

A.G.

— record

With reference to the leather belting, our party is out of town and will not return until early next week; he will call on you some time next week as soon as he returns."

Plaintiffs' testimony further showed that the tin foil, when it reached Chicago, was not "tin foil and paper," but "tin foil mixed with glass and paper," and that it was wet; that the assay of this tin foil showed it would run only 10 per cent. pure; and that the value of the tin foil was only 4-1/2¢ per pound.

Defendants' testimony tended to show that at the time the tin foil was being discussed, it could plainly be seen in the barrels, and that it was stated to plaintiffs' representative that it was "tin foil mixed with glass and paper," and that it was wet; that he wanted 14¢ per pound "as it runs;" that plaintiffs' representative said he would take a sample and test it and would communicate with him further; that afterwards ^{Frank} Mr. A. Grossman was called on the telephone, and after discussing the price ~~xxxxxxx~~, an offer of 11¢ per pound was made for the tin foil "as it runs," which was accepted.

The evidence clearly shows that the controversy over the tin foil was not with reference to the value thereof, but whether or not the material purchased was "tin foil and paper," or "tin foil mixed with glass and paper," and wet. The basis for fixing the value of the tin foil was not in dispute: it was not, therefore, a question of unliquidated damages, but simply a question whether or not plaintiffs or defendants were correct as to the character of the tin foil that was purchased.

Another controversy arose with reference to the materials purchased on March 4 and made the subject matter of a written agreement. The evidence shows that this controversy, in the main, did not affect the value of the material shipped, but merely the question as to the amount thereof.

Plaintiffs introduced evidence to show that they had not received the amounts purchased, and claimed to have been shipped by

the defendants. This was denied by the defendants. The record clearly shows, however, that with reference to certain items making up plaintiffs' claim, it was purely a question of computation, such as whether or not so many pounds of red brass or yellow brass had been shipped, because with reference to these items the amount to be paid for either red brass or yellow brass was fixed and definite. This is shown, not only by the written memorandum of agreement in evidence, but also by oral testimony in the case.

At the time shipment was made, a draft was drawn on the plaintiffs in the sum of \$1,872.03 which was attached to the bill of lading, and which was paid by the plaintiffs before delivery of the material. Plaintiffs contend that by payment of this draft, they overpaid defendants for material shipped them under the agreements entered into between them; that by reason of this overpayment, defendants were indebted to them for moneys had and received, for which an action of indebitatus assumpsit would lie.

Plaintiffs therefore maintain that the court erred in dismissing the suit for want of jurisdiction of the subject matter. And we concur in this contention, in view of the facts above stated.

That the court had jurisdiction of the persons of the defendants is evidenced not only by the affidavit of merits and claim of set-off, but by the introduction of evidence in support thereof.

In the case of Baldwin v. McClelland, 152 Ill. 42, the following appearance was entered on behalf of the defendant:

"We hereby enter the appearance of the above defendant, and our appearance as attorneys for defendant.
Cratty Bros., Attys. for Deft."

After filing the foregoing appearance, the attorneys asked for a rule upon the plaintiffs to file a more specific bill of particulars and a bond for costs, without limiting their appearance for that purpose. The court held that these acts constituted a general appearance and, moreover, that they partook of the nature of affirmative acts in the cause, and that consequently the defendants had submitted themselves to the jurisdiction of the court. So in

the case at bar. The filing of the affidavit of merits and claim of set-off can be construed only as a general appearance and an affirmative act which conferred upon the court jurisdiction of the persons. The court, therefore, should have proceeded to try all the issues; and as the judgment complained of shows that the court failed to do so, it must be reversed - provided plaintiffs have properly preserved this question for review.

As the court's ruling was adverse to the plaintiffs, under section 81 of the Practice Act they are entitled to have it reviewed in any court to which the same cause may come on appeal or writ of error, without formal exception thereto.

On the question whether or not plaintiffs have preserved for review the question of the court's error in dismissing the suit for want of jurisdiction of the subject matter because no propositions of law had been submitted to the court to be held, defendants contend that in the absence of such propositions of law it must be presumed that the court proceeded on the correct principles of law and applied them to the facts. While that contention may be conclusive in certain cases, it is not so in the case at bar.

The purpose to be subserved by propositions of law is to determine whether the trial judge (sitting as judge and jury) entertains correct views of the principles of law involved in the proceeding. In some instances it is only through the medium of such propositions that the record can be made to show the views of the court as to the principles of law applicable to the facts of the case. Union Traction Co. v. City of Chicago, 302 Ill. 570. In the case at bar, however, the ruling of the court itself showed the principles of law that the court applied to the facts; therefore it was not necessary that the propositions of law be presented to the trial court.

We have already held that under Section 81 of the Practice Act the appearance of this adverse ruling in the stenographic re-

port, which was certified as correct, preserved plaintiffs' right to have it reviewed without the necessity of a formal exception.

For the reasons hereinabove assigned, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

148 - 21124

LOUIS J. BLUM et al.,
Defendants in Error,

vs.

JOSEPH BROWN & COMPANY, a corp.,
Plaintiff in Error.

382
ERROR TO MUNICIPAL COURT
OF CHICAGO.

1921 A. 70

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

In this cause a motion has been made by the defendants in error, who appear pro se., "to strike from the record the so-called correct Statement of Facts or Bill of Exceptions and to affirm the judgment with statutory damages."

The motion to strike from the Transcript of Record the document entitled "Statement of Facts appearing upon the trial hereof," is allowed for the reason that it appears by the transcript that the time for the defendant to present the Statement of Facts had, consequently, the jurisdiction of the Judge to certify to the same, ended upon January 1, 1915; whereas it further appears in the Statement of Facts itself that the same was presented, signed and sealed on January 2, A. D. 1915. The fact that January 1, 1915, is a holiday, mentioned in our Negotiable Instruments Act, has nothing to do with the matter.

As there is no error assigned upon the common law record, there is nothing before us to justify further consideration of the cause, and the judgment of the Municipal Court of Chicago is affirmed. There are no statutory damages, however, to assess. We cannot assume, having stricken the Statement of Facts from the files, that the writ of error was sued out for delay.

The judgment is affirmed.

AFFIRMED.

10 - 10400

ELBRIDGE KANEY,
Plaintiff in Error,

vs.

CHIEF PUBLISHING COMPANY,
Defendant in Error.

Municipal Court
of Chicago.

1921A, 2

MR. FORESTING JUSTICE HANES DELIVERED THE VERDICT OF THE COURT.

This was a suit upon an account stated in which judgment was rendered for \$1,000. The record is in two parts. One is certified to on March 3, 1913, as the transcript of the record of the case in the Municipal Court of Chicago, and the other is certified to on March 18, 1913, as an additional record of said case. The latter is in loose form and contains two documents, one certified to by the trial judge as "additional record of proceedings subsequent to entry of judgment," and one certified to by him as a correct stenographic report of the evidence introduced and proceedings in the cause. Said stenographic report purports to have been presented, signed and sealed on March 17, 1913, two days after this "additional record" was certified to by the clerk of the court. Furthermore, there is nothing to indicate that said stenographic report was ever filed in the Municipal Court. The clerk's transcript of the additional record does not recite that it ever was, and it does not even bear a file mark. There is nothing to show that it ever became a part of the record of the court below, or that it was an actual part of the additional transcript then certified to by the clerk. In the absence of such showing or explanation of the incongruous state of the record, the motion of defendant in error to strike said so-called stenographic report from this record and the files of this court will be granted.

As all the alleged errors relied upon and argued by plaintiff in error are predicated on proceedings of which no record

is duly preserved, and no error appears on the face of the record
as it remains before us., the judgment must be affirmed.

AFFIRMED.

JOSEPH PODLASKA,
Appellee,
vs.
ROYAL NEIGHBORS OF AMERICA,
a corporation,
Appellant.

Appeal from
County Court,
Cook County.

1921A.73

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$1,000 recovered against a fraternal beneficiary society on a benefit certificate issued to the wife of appellee.

The only question we need consider is whether certain false answers made by the insured in her application for membership rendered the beneficiary certificate void, regardless of whether they are to be considered as warranties or mere representations.

That the application and certificate were parts of the contract with the insured is not questioned. In her application she declared and warranted that her statements therein were full, complete and literally true, and agreed that they should form a part of the benefit certificate, and that if they were not true, it should become void. The same agreement was also embodied in the certificate which also stated that it was issued in consideration of the warranties and agreements made by the applicant.

In answer to two questions in her application for membership, whether within the last seven years she had consulted a physician in regard to personal ailments, and had ever had pneumonia, she answered "No." Unquestionably the answers were false. The evidence shows that one Dr. Habericht was consulted by her in January, 1911, about four months before her application was signed, and that he then told her, "I guess you got a little bronchitis, pneumonia. You come in about two or three days and bring your sputum with you."

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and I will make a careful examination." He made an examination and testified that she then had "pneumonia, lobularis pneumonia."

It is unnecessary to consider appellant's liability in connection with the fact that in the autumn of that year, but some months after her application, Dr. Albrecht treated her for pulmonary tuberculosis, from which she died the following February, and for which she was treated by Dr. Hebanicht about two weeks before she died. The evidence is uncertain whether there was any development of that disease prior to her application. But the fact that she had consulted a physician for a personal ailment, of the nature of which she was informed, stands unquestioned in this record, and presents the question whether or not the court should not have granted defendant's motion for a directed verdict.

In a long line of similar cases, it has been held that material misrepresentations render the policy or certificate void, especially when knowingly made by the insured for the purpose of securing insurance, even though they are not warranties. The cases on the subject are so uniform and numerous as not to require citation.

The only question open for argument here is whether the false statements in question were material. We think they were. Appellant unquestionably had a right to know the truth pertaining to the applicant's previous state of health as a basis for determining whether it would assume the risk. The questions thus untruthfully answered had a direct bearing on that question. Whether she had occasion previously to consult a physician in regard to personal ailments was material to that end. If she had answered truthfully, appellant might have verified her statements or have been unwilling, with or without further inquiry, to incur the risk of insuring one who had had occasion to consult a physician for such ailment only four months before. It can only be inferred that she must have regarded such circumstance as unfavorable to her application, else she would not have concealed it.

Whether there was any connection between her pulmonary attack in January and the development of tuberculosis to an advanced stage in the autumn of the same year, we are unable to say from the record and it is unnecessary to consider. Both the application and certificate emphasized the requirement of truthful statements as a condition precedent to a binding contract, thus warning the applicant of the effect of misrepresentation. Her statements having been unquestionably and knowingly false with regard to material matters, especially as to previously consulting a physician, the certificate, by its express terms, became void, and the beneficiary obtained no rights thereunder. The testimony disclosing such falsity not having been contradicted, the trial court should have directed a verdict for defendant. The judgment will be reversed and judgment entered here with a finding of fact incorporated therein.

REVERSED

FINDING OF FACT.

We find that Berena Podlesak, whose life was insured for the benefit of Joseph Podlesak, appellee, by the Royal Neighbors of America, appellant, did within seven years preceding May 7, 1911, the date of her application for such indemnity, consult a physician in regard to a personal ailment and that she then had the disease known as lobularis pneumonia.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

EDWARD J. SCHAEFFER,
Plaintiff in Error.

Error to
Superior Court
of Chicago.

192 I.A. 10

MR. PRESIDING JUSTICE PARKES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was tried and convicted on an information charging him with living in an open state of adultery with one May Armstrong. It is urged that the information charges no criminal offense, and that the evidence was insufficient to show an offense under Sec. 11 of the Criminal Code on which the information rests.

As to the information, it is claimed that it is defective in that it fails to charge (1) that they "lived together" and (2) that they were not married to one another. It is difficult to understand why these points should be raised. Contrary to the first contention the information in apt language expressly alleges that they did live together, and conclusive of the latter is the case of Crane v. People, 186 Ill. 336, where the same point was urged and adversely decided.

As to the sufficiency of the evidence, there can be no question.

The character of the offense is one which by the statute is sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy. (Sec. 11, Criminal Code.)

The evidence clearly shows that each of the parties was married and knew the other was; that he was living separately and apart from his wife and she from her husband; that he had rented rooms in different parts of Chicago at different times and occupied

them with her, and that in none of the places she took his name; that in one of the places there was only one bed; that both of them were seen in the room in their night clothes; that the place they lived in when the information was filed and during the trial was rented in their joint names and occupied by both of them. While there are a denial of an illicit relationship and that they occupied the case room, it is unnecessary to review in detail the evidence that justified a different conclusion. Scarcely any more convincing evidence would ordinarily be required.

The judgment will be affirmed.

AFFIRMED.

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
vs.
RAY ARMSTRONG,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

192 I.A. 32

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was tried and convicted on an information charging her with living with one Christian H. Schaeffer in an open state of fornication, and alleging therein that she was then and there a single and unmarried woman. The evidence is undisputed that she was a married woman, in which case the evidence, if true, made her guilty of living in an open state of adultery instead of fornication. The distinction between the two is well-known. To be guilty of the former offense, the person charged must be a married person; to be guilty of the latter, an unmarried person. (See "Fornication" - Bouvier's Law Dict.) There was a variance between the information and the evidence to which her counsel called attention at the close of the case. The evidence does not sustain the judgment and it must be reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM J. BLIGH,
Defendant in Error,

vs.

THE PEOPLE'S PACKING COMPANY, a
Corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921 A. 38

MR. PRESIDING JUSTICE EARNEST DELIVERED THE OPINION OF THE COURT.

The trial of this case was had before the court without a jury. No propositions of law were submitted to be held or such, and no controlling question arises on the rulings as to the evidence. The only question presented is whether the evidence justified the finding and judgment for Bligh for \$348.88, claimed as salary due him as secretary of the defendant, a corporation.

Bligh was its secretary, and, together with its president and vice-president, constituted its board of directors. The stock-holders voted them a salary of \$50 per week each. The resolution specified no particular duties to be performed, and there was no rescission of such action. The company operated a hog packing business. Outside of his duties as secretary, Bligh did the buying of the hogs. But plaintiff in error claims that because in July, 1912, the company temporarily stopped buying hogs, thus dispensing with the necessity of Bligh's 'extra services,' as it termed them, his salary ceased. The minutes of the corporation show that the salary was voted to him as an officer and not for any special or 'extra services.'

After the company ceased buying hogs, it sought to dispose of its product on hand, about \$20,000 worth, not with a view of closing out its business, but to start up again later, which it did with fresh capital in December following. That the several officers did in the meantime is not shown by the record, but Bligh still continued to act as secretary. The only controverted question of fact

was whether the officers agreed to a suspension of their salaries. No official action was taken in regard to it by the board of directors or otherwise. The only evidence directly bearing on the subject was that a conversation was had between the president and secretary about which they disagreed, the former claiming it was to the effect that the salaries were to cease until the concern started up again, and the latter, that the salaries were to be credited but not paid until the company resumed active operations. But Eligh's version of that matter is corroborated by the company's books on which he was credited with the amount of salary owed for and, as it appears, with knowledge of the president, who alone appears to dispute the liability, and if he had any power in the matter, he did not direct the bookkeeper to cease crediting Eligh with his salary until October 18th, up to which time the salary was claimed.

We do not think it can be said that because during the interim between July and October 18th, he did not perform such extra services, he, therefore, was not entitled to a salary as secretary, nor that because the company temporarily suspended active operation, the obligation to fulfill its contract to pay salaries terminated. No question of law on the matter was directly raised and the evidence is sufficient to sustain the judgment, which will be affirmed.

AFFIRMED.

A. L. BERRY COAL COMPANY,
an Illinois Corporation,
Defendant in Error,

vs.

R. H. HARDEN,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921 A. 34

MR. PRESIDING JUSTICE D-SNEED DELIVERED THE OPINION OF THE COURT.

This was a suit on a promissory note. Harden was the maker and it was made payable to the order of A. L. Berry, who was president of defendant in error. The final endorsement on the note was by A. L. Berry to the order of defendant in error. There were prior endorsements thereon, but all had been crossed.

The defenses pleaded were (1) want of consideration, (2) want of legal title, (3) derivation of title from a foreign unlicensed corporation, and (4) fraudulent organization of defendant in error. No attempt was made to sustain any of these defenses except by calling A. L. Berry, under Sec. 33 of the Municipal Court Act. Defendant rested with his testimony and the Court directed a verdict for plaintiff on its motion.

The examination of said Berry contained many insinuations but no evidence of any probative value for defendant. There was no attempt to prove want of consideration and nothing that had any legitimate tendency to show that defendant in error was not a legal holder for value. Inasmuch as the note was negotiated back to the payee of the note who endorsed it over to defendant in error, we find no occasion for considering the nature of the title of the intervening endorsee whose endorsements were created by Berry as he had the right to do under the Negotiable Instrument Act (Sec. 49), and the instrument having been negotiated back to him, he had the right to re-negotiate the same (Sec. 50). The testimony relied upon to support said defenses had no tendency to establish any one

of them, and, as we view it, so long as the note came back into the hands of the original payee, it is immaterial whether one of the intervening endorser was a foreign corporation, unlicensed to do business in this state or not. The judgment will be affirmed.

AFFIRMED

ARTHUR W. MEYER and SAMUEL C.
HESS, Co-partners, trading as
MEYER, HESS & COMPANY,

Defendants in Error,

vs.

BARAN & McLAUGHLIN, Inc., a corpo-
ration,

Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921 A. 35

MR. PRESIDING JUSTICE BARBER DELIVERED THE OPINION OF THE COURT.

We shall refer to the parties herein as plaintiffs and defendant respectively. Plaintiffs stored with the defendant as a warehouseman two packing cases of merchandise and claimed that, when they were returned, certain of the articles were missing of the value of \$51.73, and that they were lost through defendant's negligence. The suit was brought to recover their value and the trial was had before the court without a jury. Defendant urged that the evidence was insufficient to sustain the finding and judgment against it.

There is no doubt that if the goods were lost while in defendant's possession through its negligence, it would be liable therefor, and if there was prima facie evidence of such loss and that the cases contained the lost articles when delivered to defendant, the burden of proof was on defendant to show that they were not lost while in its custody or through its negligence.

✓ Plaintiffs' employe, who packed one of the cases, testified that when it was returned he unpacked it and found that certain articles he had put into it were missing, and that the box was broken and appeared to have been tampered with; and his testimony as to the condition of the case was corroborated by one of plaintiffs. But there was no testimony covering the period of time intervening the delivery of the case to plaintiffs' transfer and his delivery of it to plaintiffs. The transfer was not called to testify, and no

presumption could be properly indulged that it was not tampered with while in his possession.

The other case was receipted for by another of plaintiffs' tennanters and delivered to Sears, Roebuck & Company. One of the latter's clerks testified that he checked its contents with plaintiffs' invoice and found some of the articles were missing. But the invoice was not produced nor was competent proof made of the contents of the box. A memorandum, purporting to be a copy made by the witness from plaintiffs' books, of a list of the articles packed in the box was received in evidence of its contents over defendant's objection; but the books themselves were not produced nor the correctness of their entries shown by the bookkeeper who made them or by any other competent evidence.

On the contrary, it was testified to by defendant's foreman that he personally received the cases for storage and superintended the piling of them away; that he personally delivered each to plaintiffs' respective tennanters, taking their receipts therefor, which state that they were received by them in good order; that he personally knew they were in the same condition when delivered to said tennanters as when received by defendant; that he had personal charge of the warehouse while it was open, and knew of no theft committed therein. Plaintiffs admitted that four of defendant's employees who helped to pile the cases would, if present, testify that they worked around the warehouse and that the cases were not tampered with in any way and were in the same condition when delivered as when received by defendant. ✓

Not only did defendant's evidence negative negligence on its part, but plaintiffs' evidence was insufficient to establish it. It fails to cover the entire period of time when one box was out of defendant's possession, and the evidence is incompetent to show what were the original contents of the other, and, therefore, whether anything was missing therefrom. The judgment is against

the preponderance of the evidence and will be reversed.

REVEREND.

17 - 1117

FINDING OF FACT:

We find ~~that~~ plaintiff in error, Wakan & McLaughlin, a corporation, not guilty of negligence.



CITY OF CHICAGO,
Defendant in Error,

vs.

JOSEPH BETTI,
Plaintiff in Error.

Error to

Supreme Court
of Chicago.

1921.A. 37

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit brought by the city of Chicago to recover a penalty for violation of a city ordinance prohibiting the sale of tobacco to minors.

There was a judgment for the city. There are several reasons why it should be affirmed: (1) the only errors assigned rest upon a so-called "statement of facts," whereas it is not such a document; (2) the evidence sought to be preserved is not abstracted; (3) one of the questions on which reversal was sought, namely, that the ordinance was not duly passed, was not raised below; and (4) none of the points argued are good in law.

The contention that the testimony of one of the boys as to his age was hearsay and incompetent evidence, is against the rulings of the Supreme Court on that subject. (Kash v. The People, 220 Ill. 85; Raymond v. The People, 226 id. 433), and another point, that the conviction could not be sustained without the production of the tobacco sold is manifestly without merit. The evidence was amply sufficient to sustain the judgment, which will be affirmed.

AFFIRMED.

CONSUMERS MARKET HOUSE CO.,
Defendant in Error,

vs.

L. WALTER POWERS,
Plaintiff in Error.

United States Court
of Chicago.

1921 A. 89

MR. PRESIDING JUSTICE W. NEL DELIVERED THE OPINION OF THE COURT.

The errors assigned herein arise upon the overruling of a motion by Powers, the defendant below, to vacate and set aside a judgment by confession against him and for leave to appear and plead to the cause.

The judgment was for rent due under the terms of a sub-lease from defendant in error (called plaintiff hereafter) to plaintiff in error (called defendant hereafter).

The case may be decided wholly on either defendant's affidavit in support of his motion set forth a meritorious defense. He contends he became released and discharged from the obligation to pay rent under the lease because, after he abandoned and vacated the premises but before any further rent had accrued, he presented to plaintiff a tenant who offered to lease the premises as an office for a cleaning and dyeing establishment, but plaintiff refused to accept him.

Defendant contends that plaintiff was under obligation to accept such tenant because the lease provides that if defendant abandons or vacates the premises "the lease shall be relet" by plaintiff for each rent "and upon such terms as it may see fit."

From the language quoted it appears, however, that plaintiff reserved to itself the right to prescribe the terms of a subsequent lease. One of the terms under which the proposed tenant offered to take the premises was that he might occupy them for a purpose for which it appears the defendant himself could not use them. His lease provides that he shall occupy them "for a laundry store

for the sale of bakery goods only and for no other purpose whatever." We know of no rule that would compel plaintiff to relet the premises for a purpose other than ^{that} for which defendant's lease restricted their use; nor is there anything in the terms of the lease or the provision for reletting that warrants the construction that it should.

But it is also expressly provided in the lease that the restrictions and limitations contained in the original lease to plaintiff shall be binding on defendant. Defendant could not raise out a meritorious defense without showing that the terms on which the new tenant could lease the premises could conform to such restrictions and limitations. If they were such as to prohibit their occupancy as an office for a typing and cleaning establishment, then both plaintiff and defendant were precluded from using them for such purpose. Besides, it is fundamental that a covenant in a lease, restricting the use of premises for certain specified purposes, is binding upon sub-lessees and sub-tenants. (24 Cyc. p. 1084.) The mere fact, therefore, that defendant presented a tenant who offered to take the premises for a purpose for which defendant himself by the terms of his lease was precluded from using them, and for a purpose which for aught that appears the sub-lessor could not use them, cannot be regarded as constituting a meritorious defense to the obligation to pay the rent that subsequently accrued and for which judgment was given.

It is unnecessary to consider whether the court could properly consider the counter affidavits filed to the motion. It could not do so if they controverted material questions of fact (Gilchrist Trans. Co. v. North-Grein Co., 336 Ill. 510, Hoon v. Gahr, 175 Ill. App. 730); but they did not. They admitted facts relied on in plaintiff's affidavit and supplemented them by stating that the restrictions of the original lease referred to and made binding on defendant in the sub-lease limited plaintiff's use of the

premises to occupation for a grocery, a meat market and for the sale of bakery goods only. So far as the counter affidavit presented mere questions of law they were mere arguments, and, regardless of their contents, the court's action was justified by the failure of defendant's affidavit to present a prima facie defense. The counter affidavit, therefore, may be entirely disregarded. The action to strike the statement of facts from the record will be denied. The judgment will be affirmed.

APPROVED.

GROSSFELD & ROE CO.,
a corporation,

Defendant in Error,

vs.

EMANUEL ZUCKERMAN,

Plaintiff in Error.

Error to
Municipal Court
of Chicago.

199 I.A. 90

STATEMENT OF THE CASE. By this writ of error the defendant, Emanuel Zuckerman, seeks to reverse a judgment rendered against him by the Municipal Court of Chicago for \$2,323.23, in favor of Grossfeld & Roe Company, a corporation, plaintiff. The cause was tried before a jury, and at the conclusion of the taking of all the evidence the jury were instructed in effect to return a verdict in favor of plaintiff in the sum of \$2,323.23, which they did, and the judgment followed.

The action was commenced on August 8, 1911. In the statement of claim it is alleged in substance that plaintiff's claim is for money due, viz: principal and legal interest, upon an instrument in writing executed by defendant on March 14, 1903, in part as follows:

"Chicago, March 14, 1903.

The Grossfeld & Roe Co.,
Chicago.

Gentlemen:

I hereby confess that I have in the past several months made collections from various customers that I have not turned over. I will, to the best of my knowledge, give you below the names and amounts of the various people that I have collected from, asking your kind indulgence in giving me one more chance to make a man of myself and again gain your valued confidence. I will try my utmost to repay and be a valuable man to your house if given this one chance.

Again begging you for your kind indulgence, I remain,

Sincerely yours,

Emanuel Zuckerman."

And immediately following the above signature there is written the names of twenty-nine persons and opposite each name there is written certain figures, and underneath the column of figures is written the total sum, "\$1,639.60," and underneath this total sum

is again written, "Emanuel Zuckerman." It is further alleged that "said writing was given in evidence as indebtedness created by the false embezzlement, misappropriation and defalcation of the said Zuckerman while acting in a fiduciary capacity, to-wit: as agent and collector in the employ of the plaintiff."

In said statement of claim, in a second paragraph or count, plaintiff claimed the additional sum of \$316.00, and legal interest thereon from June 17, 1903, "upon sundry acknowledgments or receipts in writing of monies by him, the said defendant, at sundry times collected for and on behalf and as the property of the plaintiff from diverse persons or firms," which moneys had been embezzled by the defendant while acting as agent or collector of the plaintiff.

On August 28, 1911, on motion of defendant, the court ordered that the plaintiff file an amended statement of claim within 10 days, and that defendant file an affidavit of verity within 10 days thereafter. On September 13, 1911, plaintiff moved that said order of August 28th, requiring it to file an amended statement of claim, be vacated and set aside, and the court ordered that said motion be entered, to be taken up on notice. On January 13, 1912, the cause coming on to be heard on plaintiff's said motion, the court overruled the same, but ordered that "leave be given to plaintiff to file an amended second count to statement of claim within 30 days," and that defendant file an affidavit of verity thereto within 30 days thereafter. Plaintiff never filed an amended second count, nor made any attempt at the trial to sustain by proof its said additional claim of \$316.00. On January 27, 1912, [before the time had expired for plaintiff to file said amended second count,] defendant filed an affidavit of verity, in which he alleged, inter alia, (1) that plaintiff's cause of action as stated in its statement of claim did not accrue to the plaintiff within five years before the commencement of the action, and (2) that "when the paper, a copy of which is set out in the plain-

tiff's statement of claim, was signed," he, the defendant, was in plaintiff's office, and was there falsely charged by representatives of plaintiff with having embezzled money from plaintiff and threatened with arrest unless he signed said paper, and was there promised by plaintiff's representatives that upon an accounting being had he would be credited with certain commissions, to which he, as an employee of plaintiff, was entitled, but that no accounting was ever had, and that "at the time of the signing of the said paper" he was in fact not indebted to plaintiff in any sum whatever.

On February 8, 1913, defendant filed an amended affidavit of merits in which he made the same allegations as in his original affidavit of merits as above stated, and further alleged, by way of set-off to plaintiff's claim, that there was due him from plaintiff, for commissions earned by him from May 1, 1901, to March 14, 1903, more than \$3,000, upon which amount so earned he had received from plaintiff in weekly advancements less than \$4,000, "and upon which amount due defendant had used of the monies collected by him, which constitute a part of the items of collections set up in plaintiff's statement of claim, not to exceed \$1,000, leaving due and unpaid to defendant over and above all monies received and collected and kept by defendant from plaintiff of more than \$2,000," and from March 14, 1903, until June 17, 1903, defendant rendered services for plaintiff and was entitled to receive therefor a sum in excess of \$1,000, but that during said time plaintiff deducted and kept from defendant's weekly advancements \$10 per week, or for said 14 weeks the sum of \$140, and also retained and kept the advancement due defendant of \$40, for the last week of his employment, as well as all of defendant's commissions, amounting for said last named period to a sum in excess of \$1,000, and that there was due defendant from plaintiff, at the time of the commencement of this suit, a sum in excess of \$3,000, over and above any claim of plaintiff. And defendant further alleged in substance that while he was

not in fact guilty of any embezzlement, yet he signed the paper, not for the reason that he was indebted to plaintiff, but because of the threats on the part of plaintiff's representatives to arrest him, and that thereafter plaintiff refused to credit him with the commissions due him, and proceeded to prosecute him criminally for embezzlement, relying on said writing to produce defendant's conviction, which conviction plaintiff unjustly procured. To this amended affidavit of merits plaintiff filed a replication, alleging that the several items of set-off therein claimed by defendant did not accrue within five years, etc.

On the trial defendant was called as a witness for plaintiff under section 33 of the Municipal Court act, and he admitted that he signed and swore to the amended affidavit of merits filed in the cause. A copy of said instrument in writing was introduced in evidence, it appearing that the original thereof had been lost since the time the same was introduced in evidence on the trial of the case of People v. Zuckerman in the Criminal Court of Cook County in the year 1904. Plaintiff also introduced testimony showing that the interest on said sum of \$1,689.60, mentioned in said instrument in writing, from March 14, 1903, to the day of trial amounted to \$834.33, making a total sum of \$2,523.93. The defendant was the only witness called in his behalf, and he gave certain testimony regarding his alleged claim of set-off as set forth in his amended affidavit of merits, but practically all of his testimony relative thereto was subsequently stricken from the record by the court, with the exception of certain testimony tending to show that, during the 14 weeks he remained in plaintiff's employ after March 14, 1903, certain deductions were made by plaintiff from his salary, amounting in all to about \$180, under an agreement between the parties that said deductions should be applied as a credit on said sum of \$1,689.60. The plaintiff in rebuttal offered testimony tending to show that no such deductions or agreement were made, and the court finally gave to the jury the follow-

ing instruction:

"The jury are instructed that the only question for you to decide is whether or not subsequent to March 14, 1903, any deductions were made from the defendant's salary which were by agreement between the parties to be applied upon defendant's indebtedness to plaintiff, admitted by writing of March 14, 1903; that if you believe from the evidence that there was no agreement that deductions should so apply, your verdict should be for the sum of \$8,523.93, but at all events your verdict should be for \$8,223.93."

During the trial, at the request of attorney for defendant, it was stipulated and agreed that the Supreme Court opinion (Emanuel Zuckerman v. People, 313 Ill. 114) might be introduced and read as a part of the evidence in the cause. From this opinion it appears that a jury had found Zuckerman guilty of larceny by embezzlement and found the amount taken to be \$225.00, that he was sentenced by the Criminal Court of Cook County in accordance with the verdict, and that in December, 1904, the Supreme Court affirmed the judgment of said Criminal Court. Other facts, as disclosed from said opinion, are as follows:

"The plaintiff in error was employed by the Grossfeld & Roe Company, a corporation engaged in selling groceries at wholesale in Chicago, as an outside salesman, taking orders and collecting money from customers. He made collections from various customers which he did not account for or turn over to his employer, and on March 14, 1903, he furnished to the officers of the corporation a list of such customers and the amounts collected from them, aggregating \$1699.60, and signed two written statements confessing that he had collected said sums from customers of the corporation without accounting for them or paying the same over after demand and without the knowledge of the corporation. He was continued in the employ of the corporation afterward and collected from customers and retained other sums up to June 17, 1903, when he told the officers of the corporation that he had collected money amounting to about \$300 which he had not turned over. He was then arrested and was subsequently indicted for larceny and embezzlement. On his trial under the indictment he admitted the collection of \$316.00, specified in sundry receipts, which he had not paid to his employer. The only controversy as to matter of fact was whether he was authorized by his contract of employment to retain the sums of money collected and not turned over."

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MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for defendant first contends that the judgment should be reversed because plaintiff's original statement of claim was by order of the court stricken from the record, and no amended statement was filed, and, therefore, the court was not warranted in entering any judgment against defendant. There is no merit in the contention. Plaintiff's original statement of claim consisted of two paragraphs or counts, claiming two distinct indebtednesses, one for \$1,889.00 and legal interest from March 14, 1903, and the other for \$316.08 and legal interest from June 17, 1903. While the record discloses that plaintiff was ordered on August 28, 1911, to file an amended statement of claim, it nowhere appears that the first count of plaintiff's statement of claim was ever stricken from the record. By the order of January 13, 1912, plaintiff was given leave to file an amended second count to its statement of claim, and before the time had expired within which plaintiff might do so defendant filed an affidavit of merits, and thereby joined issue on the first count. Plaintiff never filed an amended second count, and on February 5, 1913, defendant filed an amended affidavit of merits to said first count.

Counsel further contends that it was not sufficiently proven that the written instrument of March 14, 1903, sued on, a copy of which was set out in plaintiff's statement of claim, was signed by the defendant. This contention is also without merit. In both the original and amended affidavits of merits, signed and sworn to by defendant, it was admitted by defendant that he signed said instrument. He also testified on the trial that he signed it.

The main contention of counsel for defendant, as we understand it, is that the instrument sued on is not an evidence of indebtedness in writing and does not contain any promise to pay any definite sum, and, therefore, as plaintiff's action was not commenced until more than five years after March 14, 1903, plaintiff

cannot recover. We disagree with counsel. Section 16 of the Limitations act provides in part as follows: "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued." The present action was commenced on August 8, 1911. We are of the opinion that the instrument is an evidence of indebtedness in writing. By it the defendant, under date of March 14, 1903, in effect acknowledges that he, during several preceding months, collected various sums of money, aggregating \$1,689.60, belonging to plaintiff which he had not turned over to plaintiff, and we think it sufficiently discloses a promise by defendant to repay to plaintiff said aggregate sum. (Horner v. Clarke, 27 Ill. 13; Walker v. Freeman, 209 Ill. 17, 22; Pinney v. Smith, 132 Ill. App. 129, 132; Quinlan v. Thompson, 152 Ill. App. 275.)

And we are of the opinion that the trial court did not err in excluding practically all of defendant's testimony in support of his alleged claim of set-off, and in giving to the jury the instruction above mentioned. We think that defendant's alleged claim that, on March 14, 1903, plaintiff was indebted to him for commissions to the extent of more than \$3,000, over and above said amount of \$1,689.60 mentioned in said instrument as moneys collected and not turned over to plaintiff, was barred by the statute of limitations. Furthermore, we think that the excluded testimony was properly excluded as tending to contradict and vary the written instrument sued on.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

E. D. KERN, R. H. KERN, ROBERT
KERN and KATIE OTTINGER,

Appellants,

vs.

WESTERN LIFE INDEMNITY COMPANY,
a corporation,

Appellee.

Appeal from
Municipal Court
of Chicago.

192 I.A. 16

STATEMENT OF THE CASE. On September 14, 1908, the plaintiffs (appellants) commenced an action of the first class in the Municipal Court of Chicago against the Western Life Indemnity Company, a corporation, defendant, based on the following instrument in writing, a copy of which was filed with the original declaration:

"KNIGHTS TEMPLARS AND MASONS LIFE INDEMNITY COMPANY,
Chicago, Illinois.

THIS CERTIFIES, That the amount which may be payable at the death of the insured, under policy No. 13851, upon the life of Peter Kern issued or assumed by the Life Insurance Company of Pennsylvania, will be assumed by the Knights Templars and Masons Life Indemnity Company, when a premium payment shall have been made on said policy to said Knights Templars and Masons Life Indemnity Company, and said premium shall have been duly acknowledged by a receipt signed by the General Manager of said Knights Templars and Masons Life Indemnity Company.

Executed at the home office of the Company at Chicago, Illinois, this 20th day of April, 1908.

E. C. Rosenfeld,

General Manager."

The original declaration consisted of two special counts and the common counts. On May 6, 1909, the two special counts were superseded by an "amended" count and an "additional" count filed by leave of court.

In the amended count it is alleged and substantiated that on October 20, 1900, the I. O. O. F. Mutual Life Insurance Company of Pennsylvania by its policy of insurance, No. 21732, did insure the life of Peter Kern in the sum of \$4,000, and that said policy was issued in consideration of the surrender of policy No. 13851 (issued

issued by the same Society and dated May 10, 1880) and in consideration ^{of the payment} of a premium of \$10.00 each month in advance on or before noon of the 20th day of each calendar month during the continuance of the policy, and subject to the terms and conditions of the policy. (Said terms and conditions were set out in narrative form at length in said account.) It is further alleged that on April 23, 1901, the plaintiffs were made beneficiaries under said policy; that therefore, on October 23, 1903, the Mutual Life Insurance Company of Pennsylvania, by a certificate or policy, No. 13581, assumed the liability of said Society under certain conditions (set out at length in said account); that thereafter, on April 30, 1905, the defendant, then known as the Knights Templars, etc., Company, in consideration of the premises, said and delivered its certain certificate, whereby, in consideration that said Peter Kern should make a premium payment on said policy, No. 13581, to said Knights Templars, etc., Company, and cause said payment to be acknowledged by a receipt signed by its general manager, it "assumed and agreed to pay the amount which might be payable at the death of said Peter Kern under and by virtue of said policy, No. 13581"; that said premium payment was duly made and duly acknowledged by the general manager of the defendant company, and that afterwards the defendant changed its corporate name and continued to do business as, and is now known as, the Western Life Indemnity Company. Then follow averments of the full performance of the conditions of all of said policies, including the payment of all premiums due down to and including June 19, 1906. And it is further alleged that, on June 19, 1906, during the life time of Peter Kern, and three years' full premiums having been paid on said policy and the same being still in full force and effect, said Peter Kern tendered the said policies, and each and all of them, to the defendant company, and "elected to surrender the same and receive therefor extended life insurance for the face value of said contract, or policy, for the number of years and months specified

in the table therein contained, to-wit, for the full time of 1 year and 360 days"; that within said period of 1 year and 360 days, to-wit, on October 29, 1907, said Peter Kern died at Knoxville, Tennessee, at the age of 72 years; that proof of death was furnished in due time to the defendant company and suit brought within one year from his death; and that Peter Kern during his life time performed and complied with, and plaintiffs since his death have performed and fulfilled, each and all of the conditions, promises and stipulations in said policies and the agreement contained; yet the defendant has refused to pay said sum of \$4,000, or any part thereof, to the damage of plaintiffs of \$4,000, etc.

In the additional count it is alleged in substance that before the making of the premises by the defendant hereinafter set forth, the said I. O. O. F. Society of Pennsylvania did insure the life of said Peter Kern, and by its policy did provide for extended insurance in case of lapse after the payment of three full years' premiums; and that before the making of said premises by the defendant, the said last mentioned policy was assumed by said Mutual Insurance Company of Pennsylvania; and that thereupon, in consideration of the premises and that said Kern should make a certain premium payment to the defendant on said last mentioned policy, the defendant, then doing business as the Knights Templars, etc., Company, entered into a certain agreement with said Kern, for the benefit of plaintiffs. (Here is set out in full the instrument of April 20, 1906, above set forth.) And it is further alleged that said premium payment was made and the defendant's general manager acknowledged said payment by his receipt (set out in full); and that said insurance was duly payable to plaintiffs as beneficiaries; and that said Knights Templars, etc., Company afterwards changed its name, etc.; and that said Peter Kern paid all premiums on or before the 15th day of each calendar month until and including the 15th day of June, 1908"; and that on said

June 18, 1906, said Peter Kern, having paid three full years' premiums on said policies, tendered the policies to defendant and elected to have said extended insurance for said term of 1 year and 360 days; and that on October 25, 1907, and within said extended insurance term, said Peter Kern died at Knoxville, Tennessee; and that proofs of death were in due time made, and that Peter Kern and the plaintiffs had at all times performed all the conditions of the policies, etc.; to the damage of plaintiffs of \$4,000, etc.

On June 4, 1909, the defendant filed a general and special demurrer to said amended and additional counts, but on October 11, 1909, by stipulation, it was ordered that said demurrer be withdrawn, and defendant filed a plea of the general issue to said counts, and also a plea of ultra vires, to the effect that it was beyond the powers of defendant to grant said Peter Kern the extended insurance for the number of years and months in said counts mentioned. To this plea of ultra vires plaintiffs filed a replication, to which replication defendant demurred, and on April 30, 1910, the court carried the demurrer back to defendant's said plea of ultra vires and sustained the demurrer to said plea. Subsequently defendant withdrew its plea of general issue and filed an amended plea of ultra vires, to which plaintiffs replied; defendant demurred to the replication; and on July 27, 1911, said demurrer was again carried back and sustained to the plea. Subsequently defendant filed another amended plea of ultra vires, to which plaintiffs demurred, and on May 26, 1912, this demurrer was sustained. Subsequently defendant obtained leave to file, and filed, a plea of the general issue to plaintiffs' declaration and each count thereof.

On February 23, 1912, plaintiffs by leave of court amended their "additional" count by inserting, immediately following the allegation that Peter Kern paid all premiums "until and including the 18th day of June, 1906," the following:

"Except for the month of May, 1908, and the payment for that month was delayed a few days owing to confusion and doubt as to the person to whom, and the place where, said premium should be paid, and the time when it should be paid, resulting from an attempt on the part of the defendant company to re-insure said Peter Kern in another company, and also owing to conflicting notices regarding the payment of such premiums. Said premium was tendered to the defendant company on, to-wit: May 30th, 1908, and again on the 4th day of June, 1908 - but although the defendant was in duty bound to accept said premiums when presented in spite of said delay, yet it refused so to do.

"And afterwards, on the 15th day of June, 1908, the said insured again tendered in legal tender said May premium as aforesaid, and as an alternative offered to surrender said policy for the purpose of having issued to his detained insureds for the period of one year and three hundred sixty days, in lieu thereof - both of which offers or tenders were refused by the defendant company, which assigned as the only reason for said refusal that said insurance had been forfeited for non-payment of said premium promptly on the 30th day of May, 1908."

On April 8, 1913, the cause came on for trial before a jury, and it was ordered that defendant's plea of the general issue, theretofore filed, stand as its plea to said additional count as amended. On April 12, 1913, the jury returned a verdict finding the issues against defendant and assessing plaintiffs' damages at the sum of \$1,141.04. On May 7, 1913, the court overruled defendant's motions for a new trial and in arrest of judgment, and entered judgment upon the verdict, which judgment defendant by this appeal seeks to reverse.

The following facts in dispute were disclosed by the evidence: Under date of May 15, 1898, said I. O. O. F. Society issued a policy of life insurance, No. 14887, to Peter Kern. This policy was not introduced in evidence. On October 20, 1900, the policy was surrendered and exchanged for a new policy, No. 21734, in the same society. This policy was introduced in evidence. By it the society, in consideration of the payment of a premium of \$10.00 on or before the 30th day of each calendar month and subject to many conditions specified, agrees to pay upon the death of Peter Kern to Henrietta Kern, wife, if living, and if not living, to the insured's administrators or assigns, within 90 days after the receipt and approval of proofs of death, etc., a "gross amount" of \$4,000. By the 7th clause of the printed conditions of the

policy, however, it is provided that this contract is made as a re-insurance of the risk under policy No. 14899; that the insured may pay as a premium \$10.66; that should such premium amount to less than would be required by the "table of premium rates," for the attained age of the insured, for the "gross amount" of insurance expressed, he may elect to pay premiums in conformity with such table, and that should such election not be made, the liability of the society "shall not exceed such sum as the amount paid by the insured will purchase according to the premiums prescribed by said table of premium rates." Under a heading, "Annual and Monthly Installment Premiums for each \$100 Insurance payable according to the present attained age of the insured," the monthly installment premium at the age of 64 years was fixed at 37 cents. Peter Kern was born on October 31, 1855, and he was 64 years of age at the date of the issuance of the policy, and, as the monthly premium was \$10.66, the amount of insurance this premium would purchase at the age of 64 is \$1,101.09. By the 8th clause it is provided that if this policy shall become void by the violation of any stipulation all payments shall be retained by the society, except that, if after three full years' premiums shall have been paid it shall become void solely by the non-payment of any premium when due, the owner will be entitled, on legal surrender of this policy within 30 days thereafter, (1) to receive a certificate for extending this insurance for the face value of this policy for the number of years and months specified in a "table of surrender values," upon the third page of the policy, provided that if death occurs during the term covered by such extended insurance, there shall be deducted from the amount payable the amount of premiums which would have been paid had there been no lapse, or (2) to receive a paid up life policy for the amount specified in said table, or (3) to receive the amount specified in said table as the cash value of this policy. In said table on said third page it

appeared that at the end of the 6th year the period of extension insurance would be for 1 year and 360 days. By the 11th clause it is provided (a) that after the policy has been continuously three years in force, any surplus belonging to it, as determined by the society, shall be credited hereto annually, and (b) that at the death of the insured, any surplus then standing to the credit of this policy shall be payable hereunder in addition to the amount that would otherwise be due, and (c) ^{that} providing there is no indebtedness standing against this policy, the insured may have any surplus credited to this policy applied in reduction of premiums hereon. Attached to said policy, No. 31733, is a rider, signed by the president and secretary of the society, dated April 23, 1901, to the effect that in conformity with an application of the insured the policy is made payable to the plaintiffs (naming them and describing them as the daughters of the insured).

After said policy had been in force for a period of more than three years, it was exchanged for a new policy or certificate, No. 13361, issued by the Mutual Life Insurance Company of Pennsylvania, under date of October 23, 1904. This policy was introduced in evidence and on its face it is stated that said company, in accordance with the terms of an agreement "hereon endorsed," insures the life of Peter Kern "for the same amount at death as was payable under policy, No. 31733," issued by said society, "on determinations in accordance with clause 7 of the privileges and conditions endorsed on said policy." The 'table of premium rates' referred to in said clause is the table headed 'Annual and Monthly Premiums for each \$100 Insurance Payable According to the Present Attained Age of the Insured.' The amount of this insurance, unless changed by the insured, is payable to the same beneficiaries as are named in said policy. The premium on this insurance is \$14.68, payable * * on or before the 30th day of each month in each year during the continuance of this insurance. * * This certificate shall be

referred to as Policy No. 13551." On the face of this certificate or policy there were printed in stencil the words: "Attach this to your policy." The agreement referred to as being "hereon endorsed" was printed in fine print on the back of the certificate or policy, and purports to be an agreement between said I. O. O. F. Society and said Mutual Life Company "and any member of the Society who shall accept the terms hereof, hereinafter called Insured." It is dated July 29, 1903, and the signatures (printed) of said Society and of said Company, by their respective secretaries, appear. Beneath the signatures is a table or schedule, headed "Annual and Monthly Premiums for each \$100 Insurance payable according to the present attained age of the Insured." In said table the monthly premium at age of 64 years is fixed at 25 cents, at the age of 65 years at 29 cents, at the age of 67 at \$1.10 and at the age of 68 at \$1.16. In the first clause of said agreement it is stated that the company insures the life of the Insured "in the amount which the premium paid by the Insured to the Company will pay for at the attained age of the Insured according to the Premium Schedule hereto attached; and hereby promises to pay * * the said amounts unto the beneficiary named * * within 30 days after the receipt of satisfactory proofs of death of the Insured." This provision is seemingly in conflict with the face of the policy as to the amount of the insurance to be paid upon the death of the insured, but by the 8th clause of the agreement it is stated that "if the premium paid by the Insured to the Company shall be the same as that now being paid by him to the Society, the net amount of insurance payable hereunder shall not be less than the amount payable under the present contract of insurance with the Society, as determined by Article 7 of the Conditions endorsed on said contracts." In the 3rd clause of said agreement it is stated that "Provided the Insured's policy has been continuously one year in force in Society, the Company hereby agrees upon the acceptance by the Insured of this agreement

to pay to the Insured one-twelfth of the first annual premium payable by him or her hereunder to the Company." It appears that policy, No. 21732, was continuously in force for more than one year in the I. O. O. F. Society before the issuance by the Company of said policy, No. 13681, but it does not appear from the evidence that the Company ever paid to Peter Kern said 1/12th of said first annual premium. In the 5th clause of said agreement it is provided that "The non-payment by Insured when due of any sum due hereunder shall render this agreement void, and shall discharge the Company from all liability hereunder to the Insured, and, in such event, all payments hereunder made by the Insured shall be forfeited." It thus appears that the provision, contained in the 5th clause of the policy, No. 21732, above mentioned, relative to the privilege of extended insurance, etc., in case of the non-payment of any premium when due, is not contained in said policy, No. 13681. In the 7th clause of said agreement it is provided that "notice of the amount and time of payment of any premium due the Company hereunder is given by the Company and accepted by the Insured by the payment of one such premium hereunder. Any other notice which may be required by statute, or otherwise, is expressly waived, provided, that notices may at its election be sent out by the Company, but the Company shall not be responsible for the omission or mis-carriage of any such notices." In the 10th clause of said agreement it is provided that proof of death must be furnished within six months after the death of the Insured, and that no suit against the Company upon the policy shall be brought after one year from the time of the Insured's death. It appears from the evidence that on March 18, 1904, said policy, No. 13681, in said Mutual Life Insurance Company, was assumed by the "Life Insurance Company of Pennsylvania" by written memorandum sent to said Peter Kern and subscribed by him. It further appears that Peter Kern accepted said policy, No. 13681, and thereafter paid premiums thereon either to

said Mutual Life Company or said Life Company, until said policy was assumed by the defendant or hereinafter mentioned.

Under date of April 20, 1905, the defendant company, then doing business under the name of Knights Templar and Masons Life Indemnity Company (which name was afterwards changed to Western Life Indemnity Company), executed and delivered to Peter Kern the instrument in writing first above mentioned, a copy of which was filed with the declaration. The original was introduced in evidence. It will be noticed that by this instrument the defendant agrees that, when a premium payment on said policy, No. 13551, shall have been made to defendant and acknowledged by a receipt signed by defendant's general manager, "the amount which may be payable at the death of the insured," under said policy, No. 13551, issued or assumed by said Life Insurance Company of Pennsylvania, "will be assumed" by the defendant. It appears from the evidence that the conditions of the assumption were fully complied with, viz: that a premium payment was made by Peter Kern to defendant and a receipt issued therefor signed by defendant's general manager. It further appears that all subsequent premiums, up to and including the premium payable on or before April 30, 1906, were paid by Peter Kern to defendant, but that the next premium, due May 30, 1906, was not paid when due, and that during the month of April and May Peter Kern was not in good health, and that his son, John P. Kern, was looking after his business affairs, including his insurance matters, at Knoxville, Tennessee, where both father and son then resided. It further appears that said instrument in writing, bearing date April 20, 1905, was forwarded to Peter Kern about two months before its date. It was enclosed in a letter to him, signed by the general manager of defendant and dated February 18, 1905, in part as follows: "Kindly attach the enclosed rider to your policy. By this agreement, this Company assumes liability upon your policy upon receipt from you of your premium, which will be due as shown by the enclosed premium notice." Miss E. D.

Kern, one of the plaintiffs and one of the beneficiaries named in the policy, testified that she was the sister of the other plaintiffs and beneficiaries, and that her father "commenced paying money" to defendant about March 15, 1905. Attached to her deposition was the following receipt (which was introduced in evidence), signed by the general manager of defendant: "3-15-1905. Received from Peter Kern, as premium on Policy No. 13551 to Apr. 30, 1905, \$10.68. Paid Apr. 7-05. Your next premium will be due and payable on or before April 30, 1905." Inasmuch as premiums were payable monthly on or before the 30th day of each month it thus appears that the premium due March 30, 1905, was not actually paid until April 7, 1905, but that the defendant accepted it. On March 6, 1906, the defendant company, by George M. Moulton, its president, wrote Peter Kern asking for his proxy to vote at a meeting of policy holders to be held March 13th, on the subject of the proposed re-insurance in, or transfer of the policies to, the American Mutual Life Insurance Company of Chicago, and on April 30, 1906, defendant sent to Peter Kern a copy of the proposed contract of transfer, with a letter, signed by the American Company and addressed to the policy-holders or members of the defendant company, giving ^{ten} ~~ing~~/days' grace for payment of first premiums, due May 1, 1906, and stating that "premium notice will be sent to each member prior to May 1, 1906." It appears that this re-insurance contract with said American Company was not consummated, and on May 30, 1906, John F. Kern found in his father's mail a printed letter, dated Chicago, May 3, 1906, and signed by said George M. Moulton, president of defendant, on the letter-head of defendant, stating that the "notice sent you under date of April 30th by the American Mutual Life Insurance Company of Chicago is void for the reason that said American Company did not qualify," requesting that Peter Kern "destroy the copy of reinsurance contract * * as the contract is non-effective," and further stating: "Continue your present Policy with

the Western Life Insurance Company by payment of assessments and dues, of which you will receive timely notice, as heretofore.

Notice of May Assessments enclosed herewith. Cash credits on deposit with the Company from members will be applied as heretofore for payment of assessments and dues as the same mature. * * Remittances must be in negotiable funds at par value in Chicago.

If you use your personal check add ten cents for collection as required by bank regulations." On the same day, May 30, 1906, John P. Kern mailed to defendant a check of the Peter Kern Company, payable to the order of defendant, for \$10.72, being for the amount of the May premium, \$10.62, plus 10 cents for cost of exchange. John P. Kern testified that in the months of April and May, 1906, he was looking after the payment of premiums on his father's insurance in the defendant company, and further testified, in response to the question how it happened that he overlooked sending a check for said May, 1906, premium, that "on account of the confusing and conflicting notices received about the changes which were going into effect, I did not know when to send them xxxx nor to whom."

On June 2, 1906, the defendant, in a letter signed by said Neulten and addressed to Peter Kern, returned said check "for the reason that your policy, No. 13531, is forfeited for the non-payment of the May premium which was due on May 30th." On June 4, 1906, John P. Kern wrote George M. Neulten, president of defendant, in part as follows: "I am surprised to learn that the policy is forfeited as you state. I appeal as a Templar and 38^o S. R. Mason to you * * to reconsider this decision. In Father's absence I overlooked the notice and it did not come to hand until Thursday last, and mailed the check at once. I can assure you it was an oversight. * * I beg of you that you will accept the enclosed checks, one dated May 18th for \$11.62, which is a dollar for interest for the 10 days, and another check for June for \$10.92 this includes 25¢ for bank collections." On June 7, 1906, Mr.

Moulton, president, returned the checks in a letter addressed to John F. Kern, saying in part: "Said checks are herewith returned for the reason that said policy is forfeited for the non-payment of premium due on the 30th day of May. Your father is beyond the age at which re-instatement of his policy can be considered under the rules of this Company." Thereupon John F. Kern consulted an attorney, Charles H. Brown, in Knoxville, Tenn.; and subsequently Brown was employed to make a trip to Chicago and interview the officers of defendant. On June 19, 1906, Brown called on defendant and first made a legal tender of the amount of the premiums for May and June. The defendant declined to receive the money or to re-instate Peter Kern as a member, and solely for the reason that he had failed to pay the May premium on May 30th. Then Brown, in the alternative, tendered the policies, and all riders and papers connected therewith, and requested that defendant allow Peter Kern extended insurance, as provided in the 9th clause of policy, No. 21732, issued by the I. O. O. F. Society, above mentioned. This the defendant also refused to do, - Moulton, president, at that time saying: "We did not assume any policy on the life of Peter Kern which provided for extended insurance" - and Brown left, taking the policies and papers away with him. Moulton, and a clerk in the office of defendant, testified that Moulton's said letter to Peter Kern, dated May 3, 1906, was mailed on the day of its date, as well as several thousand similar letters addressed to other policy holders. A mailing clerk of defendant also testified that she caused to be mailed to Peter Kern a notice to pay the May premium - said notice being dated May 7, 1906.

On October 22, 1907, Peter Kern died at Knoxville. Plaintiffs, as beneficiaries, in apt time made proofs of death to defendant and claimed the insurance. Defendant denied liability and refused to pay plaintiffs anything and plaintiffs, within one year from the date of Peter Kern's death, on September 14, 1908, commenced the present suit.

Counsel for plaintiffs, in his brief and argument here filed, states that the amount of the jury's verdict was not in dispute and that the case was arrived at as follows:

Premium, \$10.68, divided by 97, equals (principal) \$1,101.03	
Less 18 premiums unpaid, till death	189.24
	<u>911.79</u>
Add interest from proof of death, \$4	229.25
Amount of verdict	<u>\$1,141.04</u>

The court refused defendant's motions, made at the close of plaintiffs' case, and again at the close of all the evidence, to instruct the jury to find the issues for the defendant, and defendant excepted.

The court instructed the jury orally, in the course of which charge the jury were told that "policy No. 13551, and the contract of insurance assumed by the defendant on the life of Peter Kern from the Life Insurance Company of Pennsylvania, did not contain nor include any provision for extended insurance, such as is used upon in said declaration, and that, therefore, the plaintiffs cannot recover in this action against the defendant upon any theory of extended insurance."

The court also instructed the jury as follows:

"If you find from the evidence that after the issuance of the policy in question and its assumption by the defendant company, said defendant promised the insured that he would receive timely notice of assessments and dues, then in such event the insured is entitled to a reasonable time after the receipt of such notice, if any, of assessments or dues, within which to pay the same and payment or tender of such payment, if there is such, within a reasonable time after receipt of such notice, if any, is in apt time and valid and sufficient to keep in force the insurance in question."

"You are instructed that if at the time of the alleged lapse or forfeiture of the policy in question the defendant company had in its hands any funds of the insured, not reserve funds, or was indebted to the insured in any sum apart from the reserve fund, if there was any, it could not lawfully forfeit the policy of insurance without first applying such funds, if there were any, or moneys, if there were any, in payment of the premiums, if any were due."

The defendant, by its counsel, objected to the giving of these last mentioned instructions on the ground that there was no

basis, either in the issues framed by the pleadings or in the evidence, for either instruction.

MR. JUSTICE SHIRLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant that there should be no recovery in this case, because the policy was properly forfeited by the defendant for the reason that the premium of \$10.68, due on or before May 30, 1906, was not paid when due, and that the trial court erred in not granting defendant's motions for a directed verdict in its favor. It is argued that under no count of the declaration as finally amended, and the evidence introduced, did plaintiffs make out such a case as shows that defendant was not justified in declaring a forfeiture of the policy.

By the instrument in writing of April 30, 1906, the defendant in effect agreed, after Peter Kern had made a premium payment to defendant on policy No. 13581, and the payment had been acknowledged by a receipt of defendant's general manager (both of which conditions were complied with), to pay the amount which might be payable at the death of Peter Kern, under and by virtue of said policy, subject to its terms and conditions. The "amended" count charged in substance that Peter Kern in his life time had performed all the conditions to be by him performed, including the payment of all premiums "down to and including June 15, 1906," and that on that day elected to surrender the policy and receive therefor certain extended insurance for a certain period, during which period he died, and that plaintiffs, as beneficiaries, since his death have performed all the conditions to be by them performed, etc. The court instructed the jury that plaintiffs could not recover upon any theory of extended insurance. In the "additional" count, as finally amended, said instrument in writing of April 30, 1906, was set out in full and it was alleged that there had been a

compliance with the conditions thereof, as to payment of a premium thereon to defendant, etc. It was further alleged that Peter Kern had paid all premiums on said policy, No. 13881, on or before the 30th day of each month, until and including June 13, 1906, "except for the month of May, 1906"; that the payment for that month was delayed a few days "owing to confusion and doubt as to the person to whom, and the place where, said premium should be paid, resulting from an attempt on the part of the defendant company to re-insure said Peter Kern in another company, and also owing to conflicting notices regarding the payment of such premiums"; that said premium was tendered defendant on May 30th and again on June 4th; and that although defendant was in duty bound to accept said premiums when presented yet defendant refused. It was further alleged that on June 13, 1906, said May premium was again tendered, and "as an alternative" the insured offered to surrender said policy for the purpose of having issued to him "extended insurance," etc., but that both offers or tenders were refused by defendant for the reason, as stated by defendant, that said insurance "had been forfeited by non-payment of said premium promptly on May 30, 1906"; that Peter Kern died on October 23, 1907, and that plaintiffs, as beneficiaries, since his death have performed all the conditions to be by them performed, etc. It thus appears that this "additional" count as amended is, so to speak, a double count. Plaintiffs seek a recovery upon the theory (1) that shortly after May 30th the insured tendered the May premium, and that under the circumstances alleged the default in not making payment of said premium on or before May 30th was excusable, and defendant has attempted to declare a forfeiture, and upon the theory (2) of extended insurance. We think that the count as amended states a good cause of action upon the theory first mentioned. The defendant did not demur to it, but filed a plea of the general issue. And we think that, under the evidence introduced in support of said count, the trial court was fully warranted in refusing to direct

a verdict in favor of defendant. And we cannot say that the verdict of the jury in favor of plaintiff is against the weight of the evidence.

There was evidence tending to show that in April and May, 1906, John P. Kern was acting as the agent of Peter Kern in attending to matters pertaining to the latter's life insurance policies, and to the payment of the premiums on the policy in question; that by reason of conflicting notices received during said months John P. Kern became confused and was uncertain when and to whom he should pay said May 30th premium; that the sending of a timely notice had previously been promised; that said John P. Kern did not finally receive a definite notice as to whom he should pay said premium until May 30, 1906; and that upon receiving said notice he promptly sent a check to defendant for the proper amount, which the defendant refused to receive solely on the ground that said amount had not been received by it on or before May 20th. The law does not favor forfeiture. And we think that under the circumstances the defendant was not justified in declaring a forfeiture for the failure of the insured to pay to defendant the said premium on or before May 20, 1906. (Insurance Co. v. Eggleston, 96 U. S. 572.) Furthermore, by the third clause of the policy, No. 13581, which policy defendant assumed by said instrument in writing of April 20, 1906, it was provided that the Mutual Life Company, in case policy No. 21733 had been continuously in force in the I. O. O. F. Society for one year, agreed to pay the insured 1/12th of the first annual premium paid by the insured to said company. The evidence disclosed that said policy, No. 21733, was continuously in force in the I. O. O. F. Society for more than one year before said company issued said policy, No. 13581, but it does not appear from the evidence that said company, or the defendant, ever paid or credited to Peter Kern said 1/12th of said first annual premium. On the contrary the evidence tends

to show that at the time the defendant claimed the right to forfeit the policy, for failure of the insured to pay the premium of \$10.00, promptly on May 20, 1908, the defendant either had, or should have had, moneys in its possession for the insured in the amount of said premium. Under such circumstances these funds should have been applied to the payment of the premium before declaring a forfeiture. (Supreme Lodge v. Meister, 204 Ill. 527.)

Complaint is made to the giving of those portions of the court's oral charge to the jury as are above set out in the statement of the case. We think that there was a sufficient basis in the evidence for these instructions, that the jury were not misled thereby and that, under the evidence, the giving of the instructions did not prejudice the defendant.

It is also contended that the court erred in allowing John P. Kern to testify to the effect that he was the agent of Peter Kern during the months of April and May, 1908, in looking after the latter's insurance matters and the payment of the premiums to defendant on the policy in question. We do not think that the court erred in this particular. John P. Kern, in our opinion, was a competent witness to prove that agency. (Snodwell v. Meek, 17 Ill. 220, 226; 1 Am. & Eng. Encly. Law - and Ed. - 308; Currie v. Syndicate, 104 Ill. App. 155, 156.)

The judgment of the Municipal Court is affirmed.

ATTORNEY.

505 - 19910

WALENTY J. KASPERSKI,
Appellee (Plaintiff), }

vs. }

STANLEY KARASKIEWICZ, defendant.
CICERO STATE BANK, garnishee,

Appeal from
Circuit Court,
Cook County.

FRANK G. HAJICEK, Intervening
Petitioner,
Appellant.

1921 A. 113

STATEMENT OF THE CASE. On August 28, 1911, Walenty J. Kasperki, plaintiff, commenced an action in attachment against Stanley Karaskiewicz, defendant, to recover the sum of \$650. The Cicero State Bank was served as garnishee. The defendant was duly served but did not contest the indebtedness or plaintiff's right to an attachment. The garnishee answered that on August 10, 1911, the plaintiff, Kasperki, drew his check to the order of the Bank for \$650 and requested the Bank to credit the defendant, Karaskiewicz, with the amount of the check so that defendant might draw against said sum; that thereupon defendant drew his check upon the Bank for said sum, which check was dated August 10, 1911, and was payable to the order of Otto F. Heller, secretary; that thereupon said check, at the request of Karaskiewicz, was certified by the Bank and delivered to Karaskiewicz; that the check has not been paid by the Bank; that the same was not presented for payment until September 5, 1911, at which time it was presented by Frank G. Hajicek, banker; that when presented it was ^{not} endorsed by said Heller, the payee of the check, but only by Karaskiewicz and others; and that the Bank, failing to obtain proper endorsement, refused to pay the check. On October 20, 1911, the court ordered that notice, in accordance with the statute, be served upon said Heller, secretary of the school district, and upon said Hajicek, to appear and maintain their rights, if any, in the funds attached.

On November 10, 1911, Hajicek filed his verified inter-

vering petition, in which he alleged that after the check was drawn and certified, to-wit, on August 26, 1911, the check, endorsed by the maker (defendant) and by one John Kastner and one Stanley F. Schultz, was presented at petitioner's bank, where the same was cashed; that afterwards the check was presented to said Cicero State Bank, but payment was refused by reason of the attachment of the fund assigned in and by said check; that the check is the property of petitioner and has not been paid; that the certification constituted an assignment of the fund for the benefit of the holder of the check, and that said fund is not liable to attachment. The prayer of the petition was that the Cicero Bank be ordered to pay said sum of \$650 to petitioner, or, in the alternative, that the attachment be dismissed and said fund of \$650 be released from the effect thereof. Otto F. Heller also entered his appearance and filed an affidavit in which he alleged that said check for \$650 was delivered by Karaskiewicz as a deposit on a bid made by him for certain work to be let by the board of education of said school district; that the contract was awarded to another; that thereupon he (Heller) delivered back the check to Karaskiewicz, unendorsed by him (Heller); and that neither he nor the board of education had any interest in the check.

On November 27, 1911, the plaintiff, Kaspercki, filed his verified answer to the petition of Hajicek, in which he alleged that the check was drawn under the circumstances as set forth in the answer of the Cicero Bank, garnishee; that the check was delivered to Heller as a deposit upon a bid for certain contract work, but that the contract was not awarded to Karaskiewicz; that the check remained in the possession of said Heller until after the writ of attachment was served upon the Cicero Bank, when said check was surrendered by Heller to Karaskiewicz; and that by virtue of the service of said writ upon the Bank plaintiff acquired a lien upon said sum of \$650 deposited in said Bank, and was entitled to judgment.

The cause came on for trial on February 3, 1913, and, after hearing the testimony of plaintiff on the issues between plaintiff and defendant, the court directed the jury to return a verdict in favor of plaintiff and against defendant for \$650, which they did. The issues as to the garnishment were submitted to the court without a jury, and the court found the same against the intervening petitioner, Hajicek, and in favor of plaintiff, and on February 26, 1913, judgment on the verdict was entered against the defendant, Karaskiewicz, for \$650 and judgment on the finding was also entered, the court adjudging that Karaskiewicz, for the use of Kasperski, recover from the Cicero State Bank \$650, which when collected should be applied to the satisfaction of the judgment against Karaskiewicz. Hajicek prayed and perfected this appeal.

It appears from the evidence that the defendant, being about to bid on a contract to be awarded by the board of education of said school district, and not having the money to make the required deposit of 10 per cent. of the amount of his bid, requested plaintiff to loan him the necessary \$650. Plaintiff agreed to loan him the money for the purpose mentioned, and \$650 was deposited in the Cicero Bank in defendant's name. The defendant then drew the check in question, dated August 10, 1911, for \$650, payable "to the order of Otto F. Heller, Sec'y School Dist. No. 99," and requested the Bank to certify the same. This the Bank did and returned the check to defendant, who then delivered the check to Heller for the purpose mentioned. When defendant was notified that the board of education had decided not to award the contract to him, defendant saw Heller and demanded the return of said check, and Heller, about 10 o'clock on the evening of August 25, 1911, returned the same to him, taking his written receipt therefor. Although it was the custom of Heller, upon the non-acceptance of a bid and upon the return to the bidder of the check, payable to Heller's order accompanying the bid, to endorse the check, he testified he did not endorse the check in question, but returned the

came to defendant without his endorsement, and that the reason he did not endorse the check was because he knew that the money represented by the check had been loaned by plaintiff to defendant, and because defendant had made threats that he was not going to give the money back to plaintiff. In the meantime plaintiff had commenced this suit. The attachment writ was served on the Cicero Bank, as garnishee, about 4 o'clock on the afternoon of Friday, August 25th, before defendant had received the check back from Haller. On the afternoon of the following day, August 26th, the defendant, Karaskiewicz, in company with Stanley F. Schultz, called on John Kastner, a saloonkeeper, and requested him to cash the check. Kastner refused to do so, but went to Zelesny's bank with defendant for the purpose of there getting the check cashed, defendant and Kastner and Schultz having written their names on the back of the check. Zelesny's bank, however, refused to cash the check, and Kastner returned the check to defendant. Later in the afternoon of the same day the defendant, in company with Schultz, called at Hajiosek's bank, saw the cashier, R. F. Hajiosek, and requested of him that said bank cash the check, which was done and defendant received \$650 in currency. At this time Hajiosek's bank had no notice of the previous service of the attachment writ on the Cicero Bank. R. F. Hajiosek testified that before the check was cashed defendant showed him the tid which had been returned with the check; that he was not previously acquainted with defendant but knew Schultz and Kastner; that in cashing the check he relied on the endorsements of Schultz and Kastner; that he did not inquire why the endorsement of the payee was not on the check; that the check was sent to the clearing house on Monday, August 26th, and was returned unpaid; and that the same is the property of his brother, Frank G. Hajiosek.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for the intervening petitioner urge that the trial court erred in entering judgment in favor of plaintiff and against the garnishee, Cicero State Bank, and in not discharging the garnishee, and counsel contend (1) that the certification of the check by the Cicero Bank set aside a fund devoted to its payment, which fund should have been held for the benefit of Hajlock, the holder of the certified check; (2) that the issuance of the check transferred the funds to the payee, Heller, who alone could have been made the garnishee; and (3) that there was an equitable assignment to Hajlock of the money, which assignment should have been enforced.

It appears from the evidence that after Karaskiewicz had drawn the check in question payable to order of Heller, secretary, etc., the Cicero Bank, at the request of Karaskiewicz, certified the check, and the same was returned to Karaskiewicz. The mere drawing and certification of the check did not pass the title to the fund from Karaskiewicz to the payee, Heller. Something more was necessary, viz: delivery of the check to the payee. (More on Banks and Banking, 3rd Ed., sec. 415; Negotiable Instrument Act of 1907, sec. 16, Hurd's Stat. 1912, chap. 98, sec. 34; Buehler v. Galt, 35 Ill. App. 622, 227; Gibson v. National Park Bank, 90 N. Y. 87.) When the check was delivered to Heller it was only delivered conditionally. It was the understanding that if Karaskiewicz was not awarded the contract by the board of education of the school district, of which board Heller was the secretary, Heller was to return the check to him. And, after it was decided by the by the board that the contract should not be awarded to Karaskiewicz, Heller returned the check to him. Heller, the payee, did not then claim any title to the check or to the fund. Whatever title Heller previously had then passed from him back to Karaskiewicz, and the latter was the owner of the fund, and, in our opinion,

the fund was liable to attachment at the suit of a creditor of Karaskiewicz. (Korse on Banks and Banking, sec. 415; Gibson v. National Park Bank, supra.) After the garnishee summons had been served on the Cicero Bank, Karaskiewicz endorsed and delivered the check over to Hajicek, and received from the latter in currency the amount of the check. Hajicek did not thereby become a holder in due course. The payee of the check had not endorsed it. And because of this the Cicero Bank was not legally obligated to pay the check to Hajicek. (Lynch v. First National Bank, 107 N. Y. 179; Cochran National Bank v. Bingham, 118 N. Y. 349.) It appearing that the fund was attached by plaintiff before Hajicek cashed the check, and that in cashing the same Hajicek relied on the endorsements of Kretner and Schultz, we do not think that Hajicek's equity, if any he has, is superior to that of plaintiff. And we do not think it was necessary that the garnishee summons should have been served on Heller. The fund was in the bank, and Heller claimed no title thereto.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

PAULINE POLAK, Administratrix
of the Estate of VOJTECK DAVID,
Deceased,

Appellee,

vs.

CHICAGO AND ALTON RAILROAD
COMPANY,

Appellant.

Appeal from
Circuit Court,
Cook County.

192 I.A. 115

MR. JUSTICE CRISLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$5000 rendered by the Circuit Court of Cook County, March 1, 1918, in favor of Pauline Polak, administratrix, etc., plaintiff, and against the Chicago and Alton Railroad Company, defendant, in an action to recover damages for the alleged wrongful killing of Vojteck David on Sunday afternoon, October 27, 1907, about 3 o'clock. The accident occurred on Kedzie avenue in the city of Chicago, where five tracks of the defendant's railroad crossed the street at grade and approximately at right angles. Kedzie avenue was a north and south street and the tracks ran in an easterly and westerly direction. Commencing at the south the first two tracks were switch tracks, the next was a main track used by trains approaching Kedzie avenue from the west, the fourth was a main track used by trains approaching from the east, and the fifth was a "lead" track. There were the usual air-valve gates located on both sides of the crossing. The distance between the south gates and the north gates was 75 or 80 feet. Both gates were operated simultaneously by a man in a tower, situated about two hundred feet east of Kedzie avenue and on the south side of defendant's right of way. When the gates were down two arms crossed the entire street, another two crossed the east sidewalk and another the west sidewalk. Shortly before the accident a freight-train crew were engaged in switching empty coal cars on said most northerly track, and the train was moving back and

forth across Kedzie avenue, blocking the street. The locomotive of this train was west of Kedzie avenue, was headed east and was coupled at its front end to the train. The engineer was in the cab on the right side of the engine and had an uninterrupted view to the south and east.

Plaintiff's declaration consisted of three counts. The first count alleged in substance that the defendant, by its servants, was driving a certain locomotive, and certain passenger coaches attached thereto, along said railroad at or near Kedzie avenue, and, while plaintiff's intestate with all due care was rightfully walking on Kedzie avenue across said tracks, the defendant so negligently manned and controlled its road, guarded the crossing and managed said train, that the train struck plaintiff's intestate, and without fault on his part he was so seriously injured that he died the next day, leaving him surviving his wife and next of kin, etc. The second count charged negligence in driving a "locomotive engine and train of passenger cars backwards across Kedzie avenue" and at "such a high and dangerous rate of speed" that the train struck plaintiff's intestate, who was then and there with all due care rightfully upon said street and tracks for the purpose of crossing the tracks. The third count charged negligence in driving a "locomotive engine" across Kedzie avenue without ringing a bell or sounding a whistle, contrary to the statute, and that in consequence said locomotive struck plaintiff's intestate, who was then and there with all due care rightfully upon said street and tracks. There was no count charging wilful or wanton negligence.

It was a clear, bright day. David approached the railroad crossing from the south, walking on the east sidewalk of Kedzie avenue. There were no cars standing on the two switch tracks east of Kedzie avenue, and there were no buildings south of said tracks and immediately east of Kedzie avenue. A train approaching from

the east on said fourth track could be seen a half a mile away. The testimony is somewhat conflicting as to whether, when David reached the crossing, the south gates were up or down. Mrs. Bezzar, a witness for plaintiff, testified that she was standing on the east sidewalk of Keadie avenue south of the crossing; that David passed her and started to cross the tracks; that at that time the south gates were open, and that later she saw him struck by the train. Six witnesses for defendant testified that her reputation for truth and veracity in the community in which she lived was bad. Plaintiff's witness, Edward Keller, a boy nine years of age at the time of the accident, testified that he was playing marbles with another boy about 65 feet north of the tracks, that he noticed David crossing the tracks, and that the gates were open. He also testified that he saw a freight train strike David. Six witnesses for defendant testified that at the time of the accident and for several minutes prior thereto the gates were down. We think that it was shown by a clear preponderance of the evidence that when David reached the crossing and until after the accident occurred the gates were down.

In some manner David passed the south gates and continued to walk north on said east sidewalk, looking straight ahead and not at any time looking towards the east. Mann, the engineer of the freight train on said fifth track, testified that he first observed David when David was just inside the south gates, which were down; that David walked north; that when he reached the freight train he "bumped into" one of the cars, and then stood facing the train in the space between the train and the next track to the south, the fourth track, and made no effort to get off the tracks; and that there was nothing to obstruct his view of the train approaching Keadie avenue on said fourth track from the time he left the south gates until he was struck. In the meantime a train of empty passenger coaches was approaching from the east on this fourth

track. This train was backing east, coaches first, and was running about eight or nine miles per hour. The automatic bell on the engine in the rear was ringing. Leyden, the pilot, had such control of the train that he could stop it without the assistance of the engineer. Leyden was standing on the west platform of the car farthest from the engine, in the same position as a motorman on a street car, with his hand on the air-brake. He testified that he sounded the air whistle at frequent intervals as the train approached Kedzie avenue and that he noticed three men standing at different places immediately south of said freight train between the train and the fourth track. He further testified: "There was room enough between that freight train and my train to permit a man to stand in between. That was done right along. I passed two of the switchmen and I supposed he was the third. The space between the south edge of freight cars and north edge of my cars was probably six feet. * * He was looking at the cars in the clear of me. As I came in about 15 or 20 feet of him, he stepped back. I whistled and hollered. * * But he stepped back two steps and corner of car hit him in the side and knocked him down. Car struck back of his head. At that time I had reduced speed of my train considerable. It was not going over two or three miles an hour when it hit him. It ran probably half a car length before stopping. * * Then I jumped off. * * No part of my train ran over him. * * If he had stood still he would not have been struck." Head, the engineer of the freight train, also testified that shortly before David was struck, he leaned out of the cab window and endeavored to direct David's attention to the oncoming train but was unsuccessful. After the accident David was conveyed to a hospital where he shortly thereafter died.

After a careful review of all the evidence we find nothing to indicate that David, from the time he reached the south gates until he was struck by said passenger train, was in the exercise of due care for his own safety. On the contrary we think

the evidence clearly shows that he was guilty of such contributory negligence he bars a recovery by plaintiff. The judgment of the Circuit Court is reversed.

REVERSED.

Finding of Fact. We find that plaintiff's intestate, Vojtech David, was guilty of negligence which contributed to his injuries and death.

MORRIS FELDMAN, ABRAHAM FELDMAN,
NATHAN FELDMAN and HYMAN FELDMAN,
trading as Feldman Bros.,

Defendants in Error,

vs.

DAVID BERNSTEIN,

Plaintiff in Error.

Error to
Municipal Court
of Chicago.

192 I.A. 119

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The defendants in error, plaintiffs below, commenced an action of the fourth class in the Municipal Court of Chicago against David Bernstein, defendant, ✓ for his written contract of guaranty, dated May 26, 1912, in which defendant directed plaintiffs to deliver to J. Kier such goods as Kier might want from time to time, and agreed to become fully responsible to plaintiffs for any balance, either upon open account or promissory notes, which Kier might from time to time owe plaintiffs, not exceeding the sum of \$400 for such purchases. In said writing defendant acknowledged that he had received all notice necessary to charge him as guarantor in case plaintiffs should call upon him to pay any deficiency, and agreed that said writing should be construed as a continuing guaranty. A copy of said guaranty was attached to plaintiffs' statement of claim and made a part thereof, and it was alleged in said statement of claim in substance that plaintiffs' open account against said Kier amounted to the total sum of \$394.86, for merchandise delivered to him on May 28, May 31, June 3 and June 29, 1912, and that defendant owed plaintiffs said sum. The defendant in his affidavit of merits alleged that "he at no time guaranteed the payment of any account for goods, wares and merchandise to be sold and delivered to said J. Kier, and that he is not indebted to plaintiffs in any sum whatsoever." ✓ The cause was tried before the

court without a jury, and the court found the issues against the defendant and assessed plaintiffs' damages at the sum of \$384.86, and entered judgment on the finding against the defendant.

~ The only defense set out in defendant's affidavit of merits, as we construe it, was that defendant had never guaranteed the payment of any account of plaintiffs against J. Kier for merchandise delivered by plaintiffs to said Kier. The defendant, however, admitted that he signed the instrument in writing sued upon, but claimed that he signed it for "I. Kier" and not for "J. Kier." ~ We do not think that he sustained his claim by a preponderance of the evidence. On the contrary we think the evidence discloses that he signed the guaranty sued upon, that plaintiffs relied upon the same, that after the same was delivered to plaintiffs they, on the dates mentioned, sold and delivered to J. Kier merchandise to the total amount of \$384.86 and that the account was not paid plaintiffs by said Kier. Counsel for defendant contends that the court erred in admitting certain evidence, and in making certain other rulings. We have considered the several points and are of the opinion that no error prejudicial to defendant was committed by the trial court. The judgment is affirmed.

AFFIRMED.

THEODORE WOLF (Plaintiff) and OVER-	}	Error to Municipal Court of Chicago.
LAND MOTOR COMPANY (Garnishee),		
Defendants in Error,		
vs.		
J. F. TIMMONS,	}	
Plaintiff in Error.		

1921 A. 121

MR. JUSTICE CHIEFLY DELIVERED THE OPINION OF THE COURT.

✓ On November 10, 1913, Theodore Wolf, plaintiff, commenced an action of the fourth class in contract in the Municipal Court of Chicago against J. F. Timmons, defendant, and a summons was issued. On the same day plaintiff filed an Affidavit and bond for an attachment in aid, and an attachment writ was issued, in which the bailiff was directed to summon the Overland Motor Company as garnishee. In the affidavit for attachment plaintiff alleged that the defendant "is about fraudulently to conceal, assign or otherwise dispose of his property or effects, so as to hinder and delay his creditors," and that "the debt sued for was fraudulently contracted on the part of the debtor," and that the statements of defendant which constituted the fraud were reduced to writing and signed by defendant. On November 12th, the bailiff returned the summons with the endorsement that the defendant was "not found in the City of Chicago," and returned the attachment writ with the endorsement that he had served the same on said Overland Motor Company, garnishee, on November 14th. The garnishee answered to the effect that it was indebted to defendant in the sum of \$225.

On December 3rd the defendant entered his special appearance for the sole and only purpose of moving "to quash the writ of attachment," and of moving "to dismiss the above entitled cause for want of jurisdiction," and filed his so-called written "plea to the jurisdiction." This plea was signed by the defendant

personally, and was verified by his affidavit, sworn to before a notary public of Cook County on December 1st. It was alleged in substance in the plea that defendant, at the time of the commencement of the action, was and had been for 36 years a resident of Seneca, in the county of La Salle and State of Illinois; that he was not and had never been a non-resident of the State of Illinois; that no part of plaintiff's alleged claim against him "was contracted or caused through fraud or fraudulent intent by him"; and that the action is improperly brought, etc. It will be noticed that while in the so-called "plea to the jurisdiction" defendant attacks the jurisdiction of the court, he also traverses a portion of plaintiff's affidavit for attachment, but does not traverse that portion of the affidavit which alleges that defendant is about fraudulently to conceal, assign or otherwise dispose of his property so as to hinder and delay his creditors. It appears from the transcript that on the same day the court overruled defendant's motion. It further appears that on the following day, December 4th, the defendant moved the court that plaintiff file an amended statement of claim instant. The court granted the motion and extended the time within which defendant might file his affidavit of merits until December 31st. Plaintiff, on December 4th, filed an amended statement of claim in which it was alleged that plaintiff's claim "is for the difference in price of one automobile sold to defendant for \$819, which he refused to keep after purchasing same, and the price at which it was sold, to-wit: \$700, on or about September 26, 1913, less the expense of handling and selling same amounting to \$31." In plaintiff's affidavit of claim it was stated that \$150 was due plaintiff from defendant.

We think that the action of defendant (after the court had overruled his motion to quash the attachment writ and to dismiss the cause for want of jurisdiction), in asking the action that plaintiff file an amended statement of claim, amounted to his entering a general appearance, and that the court thereby obtained

jurisdiction of his person. (Dean v. Smith, 148 Ill. App. 355; Heickling v. Vanderpool Co., 137 Ill. App. 345, 338; Clark v. Evans, 138 Ill. App. 55; Abbott v. Semple, 85 Ill. 187.)

Section 23 of the Municipal Court Act provides in part as follows:

"That cases of the fourth class mentioned in section two (2) of this act shall be brought and prosecuted in the district in which the defendant * * resides or is found * *. But the requirement that the defendant * * must reside or be found within the district in which such suit is brought shall not apply to attachment suits * * brought against non-residents of this state, which suits may be brought in any district where any property of the defendant is levied upon, * * or any garnishee resides or is found in such district, * *."

Counsel for defendant contends that, insofar as the suit was an attachment suit, and insofar as it appeared from the defendant's verified "plea to the jurisdiction" that defendant was neither a resident of Chicago nor a non-resident of Illinois, the court could not have jurisdiction of the defendant. We cannot agree to this. The suit was started by process and summons. The attachment was in the aid of that suit, and was upon grounds other than that of defendant being a non-resident of the state of Illinois. The section quoted directs that actions of the fourth class shall be brought and prosecuted in the district in which the defendant "resides or is found." The voluntary action of defendant in moving that plaintiff file an amended statement of claim amounted to defendant entering a general appearance, and he was as much in court as if he had been "found" by the bailiff in the district and served with a summons. (Miles v. Gordon, 35 Ill. 53, 58.) The attachment in aid was but an adjunct of the original case (Moore v. Hamilton, 7 Ill. 439, 432; Rutledge v. Strickling, 26 Ill. App. 353, 354) and, defendant being properly in court, the court not only had jurisdiction of the person of the defendant but also of the garnishee, who it appears was found and served in the district. (Bailey v. Valley National Bank, 127 Ill. 332, 337.)

✓ The defendant did not file an affidavit of service to plaintiff's amended statement of claim within the time mentioned

in the court's order of December 4th, and defendant did not at any time or in any manner traverse that portion of plaintiff's affidavit for attachment in aid, wherein it was alleged that defendant is about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors, and, on December 10th, the court defaulted defendant in the original suit for want of an affidavit of merits, and after a hearing, before the court without a jury, assessed plaintiff's damages at the sum of \$150, and also sustained the attachment. And thereupon the court entered judgment in the original suit in favor of plaintiff and against the defendant for \$150 and costs, and also entered judgment against the garnishes, Overland Motor Company, on its answer for the sum of \$225, for the use of plaintiff so to \$153.10, being the amount of the original judgment and costs, and the residue for the use of the defendant.

On the following day, December 11th, the defendant moved the court to set aside and vacate the judgment against the defendant and also the judgment against the garnishes, and the motion was set for hearing on January 3, 1914, at which time the attorney for defendant presented and read his own affidavit, subscribed and sworn to on December 11th, in support of the motion. It was therein alleged that affiant procured a copy of plaintiff's amended statement of claim, filed December 4th, on December 6th; that on account of his attending court on a motion for a new trial "he had no time to draw an affidavit of merits" until Monday, December 8th; that said affidavit of merits was written up by his stenographer on Tuesday, December 9th, whereupon he immediately mailed the same to said defendant at Geneva, Illinois, but had not had time to receive it back; that on December 9th he "called up" plaintiff's attorney and asked for further time within which to file an affidavit of merits and that said attorney "led this affiant to believe" that he would allow further time; that affiant

believes that defendant has a good defense to his merits to the whole of plaintiff's demand "in that he never contracted to buy the automobile mentioned in plaintiff's statement of claim." The court overruled defendant's motion to vacate and set aside said judgments, and defendant sued out this writ of error. ✓

It is contended by counsel for defendant that the court abused its discretion in refusing to set aside said judgments. We do not think so. While the affidavit in support of the motion stated a fact tending to show that defendant had a meritorious defense to plaintiff's action there was no showing of diligence. Both diligence and a meritorious defense should be shown. (Barratt v. Cusen City Cycle Co., 178 Ill. 68; Farrier v. Miskin, 133 Ill. App. 444; Schultz v. Meiselman, 44 Ill. App. 633.)

Finding no error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

52 - 20033

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

MARGARET FITZPATRICK,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921 A. 125

MR. JUSTICE CRILEY DELIVERED THE OPINION OF THE COURT.

✓ On January 9, 1914, an information, signed by Thomas H. Sweeney and verified by his affidavit, was filed in the Municipal Court of Chicago, wherein it was charged that plaintiff in error, Margaret Fitzpatrick, "is an idle and dissolute person; is a common night walker and goes about the public streets soliciting men for the purpose of prostitution; is loud, vulgar and lescivious in speech, person and behavior; is idle and neglectful of all lawful business and she habitually and spends her time by frequenting houses of ill-fame and tippling shops." She was arrested and released on bail. Subsequently, by order of the chief justice of said court, the cause was set for trial before the Hon. Charles E. Bowles, a judge of the City Court of Chicago Heights, Cook County, Illinois, who was holding a branch of the Municipal Court at the request of the judges of said Municipal Court. She pleaded not guilty and demanded a jury trial. ✓ The jury found her guilty in manner and form as charged in the information, and she was sentenced to six months' imprisonment in the House of Correction. This writ of error was subsequently issued out and she was admitted to bail in the sum of \$1,000.

It is contended by counsel that "crimes by information can only be commenced by the state's attorney and that, therefore, the order for leave to file the information by Officer Sweeney is void." There is no merit in the contention. Criminal cases in

the Municipal Court, in which the punishment is by fine or imprisonment otherwise than in the penitentiary, may be prosecuted by the information of any person other than the Attorney General or State's Attorney, but in such cases the information must be verified by the affidavit of such other person. (Sec. 37 Municipal Court Act; People v. Zlotnicki, 246 Ill. 185.) The information in this case was properly verified by Thomas H. Sweeney.

It is further contended that the presiding judge was without jurisdiction to try the case because it appears that he was a judge of the City court of Chicago Heights, and it does not appear that he was selected by the clerk of the Municipal Court, as provided by section 90 of the Practice Act. In our opinion this contention is also without merit. The provision of said section 90 is to the effect that, in case of "death, removal, resignation or disability of a judge of any city Court" the clerk of said court may select and call in any judge of any "circuit, superior, county or probate court" of this state, and said judge so selected and called in shall have the authority, rights and duties of a duly elected judge of said city court. But it is provided by section 13 of the Municipal Court Act that "the judges of said Municipal Court may interchange with judges of other city courts, and with county judges, and said respective judges may hold court for each other and perform each other's duties when they find it necessary or convenient." The record before us discloses that the Hon. Charles H. Bowles, a judge of said City court of Chicago Heights, was, when this case was tried before him, holding a branch of said Municipal Court "at the request of the judges of said Municipal Court." In the case of American Bridge Co. v. Lena Park Association, 240 Ill. 529, a judgment was entered in the Municipal Court of Chicago against said association and others before Hon. George J. Cowing, county judge of Will County, "holding a branch of the municipal court of Chicago by request of the

judge of that court," and it was contended that said section 13 was unconstitutional. The Supreme Court held the section constitutional and affirmed the judgment. We find nothing in the present record to suggest that said judge who tried this case was not at the time properly holding a branch of the Municipal Court as authorized by said section 13.

It is further contended that the verdict is not sufficiently supported by the evidence. Section 270 of chapter 35 of the statutes of this state provides in part as follows:

"All persons who are idle and dissolute, and who go about begging; common night-walkers; lewd, wanton and lascivious persons, in speech or behavior; * * all persons who are idle or dissolute and who neglect all lawful business, and who habitually mis-spend their time by frequenting houses of ill-fame, gaming houses or tippling shops; * * shall be deemed to be and they are declared to be vagabonds."

In the information plaintiff in error was charged with sufficient particularity as being at the time mentioned such a person as is described in that portion of the statute quoted. The testimony of the six witnesses for the people was to the effect that she was a common night walker and prostitute, and further that she was dissolute, neglectful of all lawful business and habitually mis-spending her time frequenting tippling shops. Plaintiff in error was the only witness in her own behalf. She denied the charges made against her and stated that at the date of her arrest, "and prior to that time within 18 months" she was doing general housework for her employer at No. 1127 La Salle Avenue, for which services she received \$5 a week and room and board, and that her husband, living in California, regularly sent her \$10 a week. The jury evidently did not believe her testimony. We are of the opinion that the verdict is amply supported by the evidence. And we do not think that the trial court in any of his rulings on evidence committed such error, if any, as warrants a reversal. The judgment of the Municipal Court is affirmed.

SAMUEL BURNS,
Defendant in Error,

vs.

WILLIAM A. SULLIVAN,
Plaintiff in Error.

}
} Error to
} Municipal Court
} of Chicago.
}

1921 A. 127

MR. JUSTICE CHIEF JUSTICE DELIVERED THE OPINION OF THE COURT.

On May 27, 1913, Samuel Burns, a licensed real-estate broker, commenced an action of the fourth class in the Municipal Court of Chicago against William A. Sullivan, defendant, to recover the sum of \$180 as commissions. In his statement of claim plaintiff alleged in substance that he was authorized by defendant to procure a purchaser of the house and premises, known as No. 5713 Pacific street, in Chicago, Illinois, owned by defendant; that he did procure a purchaser, named James J. Bailey, who was ready, willing and able to purchase the property; and that the reasonable value of his services is \$180, no part of which sum has been paid him. The defendant in his affidavit of merits alleged in substance that the sale of the property was brought about through the efforts of another real-estate broker; that plaintiff was not the procuring cause of the sale; and that defendant was not indebted to plaintiff in any sum whatsoever. The cause was tried before the court without a jury, resulting in the court finding the issues against defendant and assessing plaintiff's damages at \$180. Judgment against defendant was entered upon the finding, which judgment it is sought by this writ of error to reverse.

✓ The material facts are in substance as follows: Early in the year 1913 defendant listed the property for sale at the price of \$7,300 with plaintiff and with several other real-estate brokers, and defendant informed all of them that he would pay commissions to that broker who sold the property. Plaintiff mentioned the proper-

ty to said James J. Reilley, who was desirous of purchasing a house in that vicinity, and about March 18, 1915, plaintiff showed Reilley and his wife the premises and through the house. Reilley offered \$7,000, and plaintiff informed defendant of the offer, but defendant refused it. Subsequently plaintiff got Reilley to make an offer of \$7,100, but defendant also refused this offer and plaintiff informed Reilley of defendant's refusal. Thereupon plaintiff ceased his negotiations with Reilley, and according to Reilley's testimony, he (Reilley) gave up the idea of buying the house and commenced looking for another house. Subsequently Edward E. Takken, another real-estate broker, who had been trying to sell Reilley a house in a different location without success, upon being informed by Reilley that he (Reilley) had previously looked at defendant's property but had given up the idea of purchasing it because the price was too high, commenced negotiating with Reilley and defendant with the result that in a few days he procured an offer from Reilley for said property of \$7,200 (\$4,000 down and balance in deferred payments) and finally succeeded in getting defendant to accept the offer. The contract of sale was presented to both parties by Takken and signed by them, and defendant paid Takken \$180 as commission. ✓

After a careful review of the evidence we have reached the conclusion that Takken, and not the plaintiff, was the procuring cause of the sale, that defendant is not liable to plaintiff in any sum for commission, and that the trial court erred in entering the judgment against defendant. We do not find any evidence of collusion or bad faith on the part of defendant. In McGuire v. Carlson, 51 Ill. App. 225, 226, it is said:

"Unless he specially agrees not to do so, an owner may employ two or more brokers, in such case it is the broker who is the efficient cause of the sale who is entitled to commission, and this right is not affected by the fact that such broker sells to one whose attention to the property had before been called by another broker. It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, as he the first or second who engaged the attention of the purchaser. * * The party selling, where several brokers have

been employed, may, in the absence of all collusion upon his part, pay to the agent through whose instrumentality the sale was brought about, without inquiry as to whether some other broker may not have had something to do with effecting the sale."

(See, also, Vrasland v. Vetterlein, 33 N. J. L. 247, 248; Patten v. Willis, 134 Ill. App. 848, 852.)

The judgment of the Municipal Court is reversed.

REVERSED.

Finding of Facts. We find as ultimate facts that the plaintiff, Samuel Burns, was not the procuring cause of the sale of the property in question by the defendant, William A. Sullivan, to James J. Reilly, and that defendant is not indebted to plaintiff in any sum for commissions on said sale.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

FRANK H. AVERY,

Plaintiff in Error.

Writ to

Municipal Court
of Chicago.

192 I.A. 128

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On July 6, 1914, the following information, signed by David Neuman and verified by his affidavit, was filed in the Municipal Court of Chicago:

"David Neuman * * gives the Court to be informed and understand that F. H. Avery, heretofore to-wit: on the 6th day of July, A. D. 1914, at the City of Chicago aforesaid, did then and there demand money to the amount of one hundred dollars (\$100) from the affiant with menace and without reason and probable cause and thereby did threaten the affiant that unless the affiant delivered to him, the said F. H. Avery, the aforesaid sum he would cause the affiant to be placed in prison with a view thereby and intent then and there to extort and gain money, contrary to the form of the Statute in such case made and provided, etc."

The defendant was arrested, pleaded not guilty and waived trial by jury, and on July 17, 1914, the court, after hearing the evidence offered by the people and by defendant, found the defendant guilty in manner and form as charged in the information, and sentenced him to pay to the clerk of the court a fine of \$500, and costs taxed at \$9. This writ of error is sued out to reverse the judgment.

The principal point relied on for a reversal of the judgment is that the information does not charge any criminal offense. It is contended that the information is based on section 93 of the Criminal Code, which is in part as follows:

"Whoever, either verbally, or by written or printed communication, maliciously threatens to accuse another of a crime or misdemeanor * * with intent to extort money, or chattels or other valuable thing, or threatens * * to accuse

another of a crime or misdemeanor, * * though no money, goods, chattels or valuable thing be demanded, shall be fined in a sum not exceeding \$500, and imprisoned not exceeding six months."

The information charges in substance that the defendant threatened Neuman that, unless Neuman delivered to defendant the sum of \$100, defendant would cause Neuman "to be placed in prison," with the intent thereby of extorting and gaining money. We think the information failed to state the offense mentioned in the statute. The charge is not that defendant "threatened to accuse" Neuman "of a crime or misdemeanor," with intent to extort, etc. (Johnson v. People, 113 Ill. 99; Fank v. People, 30 Ill. App. 40, 42; Moore v. People, 36 Ill. App. 137.) The information being insufficient, in our opinion, to support the judgment, it is unnecessary to discuss the evidence. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

438 - 19841

EMMA L. SCHLOTTEK,
Appellant,

vs.

FREDERICK K. SCHLOTTEK,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

1921 A. 130

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Appellant filed a bill in the Superior Court of Cook County against appellee for separate maintenance. The complainant and defendant were living on a farm at Highland, Indiana, together with their daughter and son-in-law, Otto and Martha Krueckeberg. On Sunday, October 27, 1912, a son of complainant and defendant, who resided in Chicago, together with some friends, visited the complainant and defendant from Chicago, making the trip in an automobile. The defendant and his son-in-law, Otto Krueckeberg, were jointly operating a farm at Highland, Indiana. During the visit of the son Paul and his friends at the farm a controversy arose, which provoked and excited the defendant, and in which the son-in-law struck the defendant in the face, knocking him down. Defendant's glasses were knocked off his nose by the blow and broken and the pieces of glass cut his face to some extent. The daughter handed her father his broken glasses and made some unpleasant remarks to him, and thereupon the father slapped her in the face with the back of his hand. The son-in-law then set upon the defendant and gave him a severe beating. Whereupon the defendant packed up his clothing and asked his wife to come to Chicago, telling her that it was a shame for a man to be beaten by his son-in-law. The complainant took

the part of the son-in-law and daughter and in response to uncomplimentary remarks by defendant called the defendant disagreeable names. She refused to go with him to Chicago, and, two weeks later, after he had requested her to go to Chicago with him, without writing him or making any demand on him for support and maintenance, filed her bill in this cause.

In his answer the defendant offered to take his wife back and support her. The defendant came to Chicago and secured employment and remained in Chicago.

The parties to this action were married and had lived together more than twenty-six years as husband and wife. The defendant had saved some money and with it had purchased a flat building in Chicago and a small farm in Michigan, taking title in the joint names of himself and wife. The complainant was always entrusted by the defendant with the family purse and, as far as the record shows, had been treated up to the time of the occurrence above mentioned with great consideration by the defendant, and there had been no quarrel or controversy between them. At the hearing the defendant offered to receive the complainant as his wife and live with her and provide for her and give her a home as soon as he could remove or get rid of one of his tenants so that they could occupy one of the flats which they owned. The complainant refused, however, to have anything to do with defendant, and insisted upon living separate and apart from him. The chancellor, at the conclusion of the hearing, entered a decree denying the complainant the relief asked for in her bill.

Upon a review of the evidence we have reached the conclusion that the complainant has no ground for the relief which she seeks. Consideration must be given to the opportuni-

ties which the chancellor had of observing the witnesses upon the stand and their attitude in the controversy and the feelings and bias which appeared in their testimony. These considerations, taken in connection with a review of the evidence, convince us that the decree in the cause is just and proper. No useful purpose would be subserved in analyzing in this opinion the testimony of the parties and witnesses, or exhibiting the details of the controversy of record. It is sufficient to say that the wife, the complainant, is in the wrong and is not entitled to live separate and apart from her husband, who is willing to provide her a home. He has a right to refuse to live with his son-in-law and daughter at Highland, Indiana, in view of the controversy that took place there on the 27th day of October, 1912, and of the treatment which he received on that occasion. What the defendant said and did on that occasion was under extreme provocation, and the defendant rightfully considered himself as being very outrageously treated by his son-in-law and daughter, and was sufficient excuse for him to abandon his residence at Highland, Indiana, and return to Chicago. His wife, the complainant, under the circumstances, was, in law, bound to follow him and allow him to support her in Chicago if he chose to select that city as his place of residence.

The decree is affirmed.

AFFIRMED.

526 - 19931

CHICAGO TITLE AND TRUST COMPANY,

vs.

ALEXANDER R. MAC DONALD et al.,
Appellees,
On Appeal of WILLIAM ALLEN et al.,

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

192 I.A. 132

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

July 8, 1912, the Chicago Title & Trust Company filed a bill of interpleader against Alexander R. MacDonald and William Allen. The bill set up that the complainant had \$1400 and a contract which could only be paid out or delivered on the joint order of MacDonald and Allen, and that they refused to join in an order and each claimed the money.

The defendants each answered the bill, setting up his claim. On hearing the bill was sustained and a decree was entered, ordering the complainant to pay the money into court, which it did, and the complainant was dismissed out of the court with its costs.

The defendants litigated their rights as between themselves on their answers. The cause was referred to a master who took proofs and reported that MacDonald was entitled to the money and contract. Appellant Allen objected to the master's findings but his objections were overruled. The objections were ordered to stand as exceptions. On hearing before the court the exceptions were overruled, the master's report approved, and a decree entered in accordance with the master's findings. Allen prosecutes this appeal to reverse the decree.

The material facts of the case as shown by the pleadings and evidence are that on February 15, 1912, Allen and MacDonald entered into a written agreement whereby Allen was to sell and convey to MacDonald by warranty deed the property known as No. 364-366 East 24th street, Chicago, subject to a first mortgage of \$10,000, due in February, 1917, with 5% interest, and to a \$6,000 mortgage due in February, 1913, bearing interest at 5½%.

MacDonald was to sell and convey to Allen by warranty deed 540 acres in Texas and pay Allen \$2,000 in cash, of which sum \$400 was to be deposited in escrow with the Chicago Title & Trust Company. MacDonald was to furnish to Allen, within ten days, proper abstracts of title to the Texas land, showing a good title to the same in MacDonald. Allen was to furnish a guaranty policy showing title in vendor subject to the above mentioned encumbrances. Deeds were to be passed and the transaction closed within ten days. It was provided that time was of the essence of the agreement.

On the same day an escrow agreement was signed by the parties which provided that the contract, money and escrow agreement were to be deposited with the Chicago Title & Trust Company, to be delivered by it only upon their joint order. The papers and money were deposited in accordance with the escrow agreement. It appears that the trade was initiated for MacDonald by one Richardson, who represented himself as a real estate broker, but MacDonald was himself present and signed the contracts and put up the money.

It appears from the evidence that in the afternoon of the same day, February 15, 1912, Allen recalled that the interest on the first mortgage was 5½% instead of 5% as mentioned in the contract. He thereupon called up Richardson's office and left word about it. The next day he got

into communication with Richardson and told him of the error in the rate of interest, and requested Richardson to see MacDonald and inform him of the interest error, and if that made any difference the trade would be dropped immediately. Subsequently Allen asked Richardson if he had seen MacDonald in regard to the difference in the rate of interest, and Richardson told him, "Oh, that is all right, Dr. MacDonald will understand that."

Within a few days of the signing of the contract Allen procured a guaranty policy for \$16,000, and submitted it to MacDonald, who then for the first time was informed as to the difference in the rate of interest on the \$10,000 mortgage from the guaranty policy. After MacDonald's attention was called to the difference in the rate of interest between the mortgage and the contract, he always insisted that Allen would have to allow him \$250 on his purchase price in order to provide for the difference in the rate of interest. The matter of the allowance of \$250 and of the amount covered by the guaranty policy became a matter of controversy between the parties at several meetings held in the escrow room of the Chicago Title & Trust Company, MacDonald insisting that he should be allowed the \$250 difference in the rate of interest and that the guaranty policy furnished by Allen should cover the value of the property instead of merely the amount of the encumbrances thereon. MacDonald refused to complete the transaction unless the difference of interest was adjusted by the payment or allowance to him of the \$250, and unless the amount of the guaranty policy was increased to cover the value of the real estate which he was acquiring.

The master found and the decree of the court finds that at no time during the negotiations did Allen offer

or agree with MacDonald to adjust these differences, nor was any tender of the money and policy made by Allen to MacDonald.

The contract had been extended by mutual agreement to March 16, 1912, and on that date the parties met for the purpose of closing the contract. At this meeting, according to the testimony, the above questions were discussed and MacDonald proposed that Allen make good the difference in the rate of interest and carry out the contract, and that Allen declined to accede to MacDonald's request and left the meeting.

Subsequently the abstracts to be furnished by MacDonald were placed in the hands of Allen's attorney for examination. Several objections were raised by the attorney to the title to the Texas lands, some of which were afterwards waived, but one objection was not cured.

It appeared from the evidence that the title to the Chicago property was not in Allen's name, but was in the name of a person by the name of Stinson, to whom the guaranty policy ran. The answer of Allen asks for specific performance of the contract. The answer of MacDonald demands the surrender of the contract and the return of the money which he had deposited.

The evidence tends to show that at no time during the negotiations was there any adjustment of the difference in the rate of interest between the mortgage and the rate called for by the contract, and MacDonald demanded a release of his deposit because Allen had refused to adjust the differences between the parties in accordance with the provisions of the contract. The decree finds that Allen at no time furnished a guaranty policy provided for in the contract because the guaranty policy tendered by Allen did not show title in Allen; that MacDonald rightly objected to the

to the policy and to the deed and refused to carry out the contract because and on account of the refusal of Allen to perform his part thereof, which failure and refusal absolved MacDonald from carrying out the contract on his part, and that MacDonald was entitled to the repayment of the \$1,400 deposited, and Allen was not entitled to the specific performance of the contract, and orders the disbursements of the money deposited in court in accordance with the findings.

Upon a review of the evidence in the record we are of the opinion that the evidence sustains the master's report and the decree of the court.

Appellant Allen could not demand that the contract be specifically enforced for the reason that the evidence shows that the title to the land mentioned in the contract was in Mary Stinson, who was not a party to the bill. There was, therefore, a lack of mutuality in the contract which would prevent Allen from obtaining a decree of specific performance. (Cage et al. v. Cummings et al., 209 Ill. 120).

A further reason may be stated why Allen was not entitled to a specific performance of the contract. The contract provides that he was to convey the title to the Chicago property by warranty deed. The evidence shows that the legal title was in Mary Stinson. A party to a contract for a conveyance by warranty deed can not tender in compliance with that contract a deed executed by a third person. The party who is to receive the deed under such contract is entitled to have the personal covenants of the person who agreed to convey as a further security for his title. (Crabtree et al. v. Levings, 53 Ill. 526).

The decree is affirmed.

AFFIRMED.

MARGARET HYNON,
Appellee,

vs.

GUSTAVE B. HUNGAN,
Appellant.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

1921 A. 151

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

In a separate maintenance proceeding brought by appellee against appellant, an order was entered July 14, 1911, requiring the appellant to pay the sum of \$150 a month temporary alimony and \$200 solicitor's fees. From that order an appeal was taken by the defendant to this court and an appeal bond was given in the sum of \$2000. The order was affirmed by another branch of this Court at the October term 1913. (182502.11.15) On November 11, 1913, the affirmance of the Appellate Court was filed in the Circuit Court, and on the same day notice was given to the appellant's solicitor and an affidavit of complaint filed showing that none of the instalments of alimony nor solicitor's fees had been paid, and that there was due under the order of July 14, 1911, \$4250. On November 17, 1913, it was ordered that the defendant should show cause why he should not be punished for contempt for failure to make payment of alimony and solicitor's fees. On April 27, 1914, the defendant was apprehended and brought before the bar of the court, and he was again ruled to show cause forthwith why he should not be committed to the jail of Cook County for contempt of court in failing to pay alimony in the sum of \$4250, as required by the order of July 14, 1911. Thereupon the defendant was placed upon the witness-stand and examined in the presence of the court and cross-examined by counsel for complainant and by the court.

The appellant testified that he was not in a position to pay the alimony awarded and had not been at any time since the order was entered; that he had had various amounts of money since the order was made, sometimes \$200 and sometimes up to \$1500 possibly; but he had used the money to pay living expenses, office expenses and pay interest on his indebtedness, which amounted to \$90,000. He further testified that he had no income from any source; that he was not employed on salary; that he was a promoter; that no interest had been paid on any of the securities which he owned. The appellant further testified that on that day he was in position to pay \$700 or \$750 on the alimony decree and not fail on other indebtedness which he owed and which was due.

He further testified that the complainant had \$1600 in money which he had given her and she had loaned the money; that she also had \$50,000 of stock which he had given her and which could be sold readily for \$15,000. Appellant was adjudged in contempt and ordered to be committed to jail for six months or until he shall have paid the sum of \$425. to complainant or be released by due process of law. ✓

Upon the showing made by the appellant in response to the rule to show cause, a majority of the court think it is apparent - indeed, it is undisputed - that the securities owned by appellant are producing no income and never have produced any income, and that the lands which he schedules in his testimony produce no income and are encumbered; that his equities therein are very small; his indebtedness is large; he has no salary or income from any source out of which to pay the large award of alimony made in the order of July 14, 1911.

This proceeding is an effort to use the power of the court to compel the appellant to pay a money decree in

favor of complainant, where the evidence shows failure to pay the decree and the disobedience of the order of the court was the result of appellant's pecuniary inability, and not the result of wilful disobedience or wilful violation of the court's order. In Binet v. The People, 73 Ill. 188, the court said:

"It is declared in the constitution that no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud.

"In the case of Goodwillie et al. v. Millmann, 56 Ill. 525, it was said by this court: 'Even if a court of chancery has the power to commit a party for failure to comply with any decree, and there is no other ground for regarding him as in contempt, the remedy seems to be harsh and should not be resorted to unless there are no other reasonable means for its enforcement.'

"In a later case, while the power of courts of chancery to commit for contempt in a proper case was conceded, yet it was there held it was not proper for a court of equity to imprison for contempt on a failure of a party to pay a moneyed decree unless the disobedience was wilful. (O'Callaghan v. O'Callaghan, 69 Ill. 562)."

In the O'Callaghan case the court stated in its opinion that when a party was brought before a court on attachment, it would be sufficient to entitle him to be discharged to show that his disobedience had not been wilful, but was solely on account of his pecuniary inability or some other misfortune over which he had no control. In that case the court said:

"The court is empowered to punish wilful disobedience in such cases by imprisonment, but we think the spirit of our constitution forbids that the pecuniary inability of a party, not resulting from his fraudulent conduct to produce that condition, cannot be punished as a contempt by imprisonment."

In Blake v. The People, 80 Ill. 11, it was said:

"While this extraordinary power is conceded to rest in the courts, it is nevertheless subject to this limitation, imposed by the constitution, that a party may not be imprisoned except in cases where it shall appear he has the pecuniary ability to enable him to comply with the decree and his disobedience is wilful. * * * Where the neglect or refusal to perform the decree is not from mere contumacy, but

but from the want of means, the result of misfortune not induced by any fraudulent conduct on the part of the defendant, the party will be compelled to adopt some mode other than imprisonment to enforce the decree consistent with the practice in the courts, either by execution or other final process, or by sequestration of real or personal estate, or by the exercise of such powers as pertain to courts of chancery, and which may be necessary to the attainment of justice. It is not perceived in what respect decrees for alimony differ from other decrees for the payment of money. Imprisonment for non-compliance therewith, unless wilful, or unless upon a refusal of defendant, upon proper demand made, to deliver up his estate in satisfaction of the decree, is within the inhibition of the constitution against imprisonment for debt."

In the opinion of a majority of the court the case before us comes within the rule declared above. The defendant showed by his testimony that he was unable to pay the decree; that his failure to pay it was not wilful, but resulted from his pecuniary inability. There is nothing in the record that disproves or even contradicts any statement made by appellant in his testimony in response to the rule. He apparently makes a full exhibit of all his property, real and personal, and it must, therefore, be regarded as a fair and candid exposition of his monetary affairs. The case, as made by the record, does not justify the imprisonment of appellant. The order appealed from is reversed.

REVERSED.

Mr. Justice Gridley dissents.

WILLIAM ECKERT,
Defendant in Error,
vs.
EDWARD H. BARNHOEFER et al.,
Plaintiffs in Error.

192 I.A. 154

MR. PRESIDING JUSTICE MOORE
DELIVERED THE OPINION OF THE COURT.

This is a cause involving, collaterally the contract between Wellington T. Stewart, William A. Thompson and Edward H. Barnhofer, which was described in the opinion of this Court in Hoffman v. Stewart et al., 124 Ill. App. 66, and in the opinion of the Branch Appellate Court in Cross v. Davis Show Printing Co. v. Edward H. Barnhofer et al., abstracted in 125 Ill. App. 360. Owing to a difference in the evidence adduced in these cases respectively, the Courts seem to have taken a different view of the nature of the undertaking in question. Whichever view is correct, however, there is no justification that we can see for the judgment in the case at bar against Edward H. Barnhofer, who, after a summons and an order in severance against his co-plaintiffs in error, Stewart and Thompson, is prosecuting this writ of error alone and in his own behalf.

If the contract involved merely a loan, as the Court held in the case reported in 125 Illinois, 360, - Barnhofer is certainly not liable in this suit, which is apparently based on the theory that he was a partner with Stewart and Thompson. If, on the other hand, Barnhofer could be held to have been a partner at any time with Stewart and Thompson by virtue of the contract of September 1, 1911, (which was the only one produced in evidence in the case at bar) as the

Court indicated he might in the opinion in 184 Ill. App. 66, he certainly was not a partner in July, 1911, when the contract between the plaintiff and William A. Thompson was made on which this suit is founded; nor was he a partner when on the 30th of August the plaintiff, as he testifies, demanded a final payment from Thompson. The plaintiff says he "finished work" (decorating a theatre) "towards the end of August and the beginning of September."

There is nothing in this case which brings it within the exception to the general rule under which *Hoffman v. Stewart et al.*, 184 Ill. App. 66, was decided.

"It is true," we said in that case, "that a person who enters into partnership with another does not thereby become liable to the creditors of his partner for anything done before he became a partner; yet there are exceptions to the rule. One is that where a contract made by a person or firm remains executory until a partnership is created or a new partner is admitted into the firm, and such contract while it remains executory is adopted by the incoming partner * * a promise may be implied," etc.

In the *Hoffman* case the plaintiff, who was an actress, although making her contract with Thompson in July to play in his theatre, did not begin to execute it until after September 1; in the case at bar, the contract to decorate the theatre, also made in July, was entirely or substantially finished before September 1.

The final payment, moreover, for this work, the sum for which judgment was rendered - \$400 - was paid to the plaintiff in the form of a promissory note signed by Thompson under the name of a "Company." Although in one place in his testimony the plaintiff said he "still had the note," in

another he said that he "took a note for four hundred dollars as a final settlement" and that he "did not now own the note."

It is not necessary to discuss the question of how far an unpaid and dishonored note will be considered payment between the parties. It is certain that one who takes a note in payment and disposes of it to a presumably innocent purchaser, can not, while that note is outstanding, recover a judgment against the maker on the original consideration.

We have received no brief for the defendant in error and can not tell on what he relies to sustain the judgment, if he thinks it should be sustained.

There appears enough in the record to convince us of the contrary proposition. The judgment is accordingly reversed and the cause remanded.

W. S. GIBBS AND RICHMOND.

HENSON RALPH & CO.,
a corporation,

Defendant in Error,

vs.

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M. J. ALLENBROUGH,

Plaintiff in Error.

REPORT TO MUNICIPAL COURT
OF CHICAGO.

1921A 155

H. FREEDMAN JUSTICE BREWSTER

RECEIVED THE CLERK OF THE COURT.

The plaintiff below, who is the defendant in error herein, on October 11, 1913, obtained a judgment against the defendant below, plaintiff in error here, for \$41.10 in the Municipal Court of Chicago. The judgment was rendered in an action of assumpsit on the verdict of a jury to which conflicting evidence was submitted.

The matter involved was the purchase price of a lot of hats or hoods alleged to have been purchased from the plaintiff by the defendant December 28, 1911.

The defendant says in his argument before us that the issue was whether the transaction was, as testified to by plaintiff's witness, an absolute order for definitely specified quantities of certain colors of hoods, or, as claimed by the defendant, "an open or conditional order simply setting aside twenty-five dozen hang hoods for later selection and later shipping instructions to be given by defendant's department buyers when they reached Chicago. He also says the evidence on the issue was "very conflicting."

This situation is one in which the decision of a jury is particularly valuable. In this case it found for the plaintiff, and we see no reason to disturb the verdict or the judgment based on it so far as the weight of the evidence is

in question.

The contention of the appellant indeed is, not that the evidence as it stands does not support the verdict, but that "the Court so conducted the trial that the functions of the jury were virtually taken away, and unfairly so, in that the case was in form submitted to the jury, while in fact the verdict was practically directed and the appellant was hampered and prevented at every point from presenting his case and from having his version of the transactions in question placed before the jury."

We do not consider these criticisms of the rulings and conduct of the trial Court justified by the record. Various rulings excluding offers by the defendant and admitting evidence tendered by the plaintiff are specified as objectionable. It would serve no useful purpose to take them up in detail, elaborately as they have been argued by the plaintiff in error. They are mostly based on a view of what is competent evidence much more liberal than accords with the settled law of this State. Evidence of other and independent transactions where orders were cancelled and the cancellation was accepted, could not be properly introduced as throwing any light on the case at bar. Nor was there any materiality in the evidence which defendant tried to introduce, that there was a corporation of which he was president in Louisville.

We do not think the trial Judge erred in his rulings on evidence or in any remarks that he made during the trial.

Complaint is made that the instructions were incorrect. The defendant in error insists that no specific objections to the oral charge were made before the jury retired, and that this is in itself fatal to the plaintiff.

in error's argument on this point here. It is quite true that an exception to an oral charge should point out specifically the portion of the charge objected to and should be made before the jury leave the box.

DeCararo v. Halberg, 246 Ill. 93; ✓

Haskins v. Haskins, 67 Ill. 446;

Bent v. Farnald, 159 Ill. App. 882.

The "Stenographic Report" in the case at bar, however, leaves it somewhat doubtful as to the order of proceedings. It would seem though, that before the jury were orally charged, the counsel for plaintiff and defendant may have retired with the trial judge to chambers, out of the presence of the jury, and there had an argument on the instructions to be given, and that certain objections were there made. If that was the case, the judge had the opportunity to amend or correct the instructions he intended to give. That he may have such an opportunity is the reason for the rule stated. We have given the plaintiff in error the benefit of this doubt and considered his objections to the charge and his argument on the same as though they had been in every respect taken and urged in time. But as applied to the facts of this case as developed by the evidence, we see no reversible error either in the instructions that were given or in the refusal of those that were refused.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

192/164

MAC 2 1917

370 - 20307

AUGUSTE WENDE, Administratrix
of the Estate of ELLA WENDE,
deceased,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
a corporation,

Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

100-164

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of the Circuit Court of Cook County for Three Thousand Dollars in favor of Auguste Wende, administratrix of the Estate of Ella Wende, deceased, and against the Chicago City Railway Company, who was defendant below and is appellant here.

The suit was brought under the "Campbell Act" of the State of Illinois by the administratrix of Ella Wende for the benefit of her next of kin. The original declaration in four counts was filed August 10, 1911. A demurrer to this declaration and each count thereof having been sustained, an amended declaration in four counts was filed November 10, 1911. In each of the counts of this amended declaration it was charged that the defendant, the Chicago City Railway Company, on May 14, 1911, by its negligence caused the death of Ella Wende, a girl of the age of nine years, while she was attempting to cross the tracks of the defendant at or near the intersection of 69th and Justine streets in the city of Chicago.

The first count charged that the defendant "by its servants so carelessly, negligently and improperly drove, managed and propelled" a certain trolley car that it ran

down and killed Ella Wende.

The second count specified the alleged negligence in managing the car to be "that the servants in charge of said car in approaching the said crossing known as Justine street failed to ring the gong or give any warning of the approach of said car at or near the said crossing"; that the motorman of said car "failed to give warning of the approach of said car to those who were then and there about to cross said tracks at or near Justine street."

The third count alleged "that the said defendant by its servants were then and there driving in an easterly direction a certain trolley car along the said * 1st Corn street * and while the said deceased, Ella Wende * with the due care and diligence of a child of nine years of age was * attempting to cross the tracks of the said defendant, said Ella Wende fell directly in front of the fender in front of the said car" and "that at the time aforesaid there was a valid existing ordinance of the said City of Chicago which made it the duty of the defendant to provide a useful and efficient and serviceable fender, and that at the said time and place there were valid existing city ordinances, which ordinances are in the words as follows:

"Sec. 1963. FENDERS. * Every person or corporation controlling, operating or owning any street railway in the City shall equip and provide each and every car used on such street railway with fenders of steel not of the basket kind, which said fenders shall be substantially attached to the front end of such car so as to guard passengers or pedestrians from being injured or thrown under the wheels of the car in case of a collision or other accident, provided, however, that where such cars are operated in trains or where such car is attached to a grip car or other car such fender need only be provided upon the grip car or front car of such train."

Also:

"An ordinance Authorizing the Chicago City Railway Co. to construct, maintain and operate a system of Street Railways in Streets and Public Ways of the City of Chicago.

(Passed by the City Council of the City of Chicago Feb. 11, 1907.)

Sec. 10. All cars shall be equipped with efficient and serviceable fender devices, headlights and sand-boxes."

and that "it became and was the duty of the defendant to observe and conform to the said City ordinances and to have upon its said car a proper, useful and serviceable and efficient fender;" that "if the said defendant had complied with the ordinances aforesaid and had had such a fender upon the car, Ella Wende would not have been killed or seriously injured; that on the contrary such a fender would have protected and saved the deceased." but that the defendant "failed to comply with the terms of the said city ordinances and had then and there on the said car an old, defective, useless and non-efficient fender", and "the said fender when the deceased struck it failed to work properly, whereby the body of plaintiff's intestate was permitted to get under the trucks and other parts of the car and thereby the plaintiff's intestate was killed."

The fourth count, which alleged defects in the roadbed of the defendant, was during the trial withdrawn by an order of discontinuance as to the same, made at the instance of the plaintiff, and need not be further mentioned.

It may be noted at once also that we do not think the verdict can be sustained or the judgment affirmed, if they are to rest on the first or second counts of the declaration. We fail to see in the evidence justification for a belief that there was negligence in driving or managing the car, or negligence causing the accident in a failure "to ring the gong" or "give any warning of the approach of said car."

We do not think there was sufficient evidence from which the jury could properly hold, in face of the adverse testimony of eye witnesses, that the motorman was, as Mrs. Sproule says, "stooping down" at the time the girl was struck. The

great weight of the evidence seems to us to show that he was attending properly to his duty, that the car was not running at an improper rate of speed, that (even if the testimony is to be considered contradictory as to whether the gong was ringing) there was no such reason to ring the gong as to make the omission to ring it negligence; that when he did have reason to know the danger of the little girl, he tried to warn her and did everything in his power to stop the car.

If the first and second counts were the only ones in the case, we should be compelled to hold either that the jury should have been peremptorily instructed for the defendant or that the verdict should have been set aside by the Court on the motion for a new trial, on consideration of the weight of the evidence.

The third count of the declaration presents to us a different question. The defendant vigorously contends that said third count is not and has not been a matter that can be considered, since the overruling on September 15, 1913, (before the trial began) of a demurrer filed by the plaintiff to a plea of the Statute of Limitations filed by the defendant "to the Third Count of the Amended Declaration as amended," a quote from the language of the demurrer itself and of the plaintiff itself. The plaintiff, as the record states, "elected to stand by demurrer," and the defendant with plausibility argues that this was the end of the matter so far as the third count was concerned.

But the question involved can hardly be disposed of so summarily. Undoubtedly regular and correct forms of pleading and procedure would have required some further amendment or some leave to file an additional count after the demurrer in question had been overruled and election made to stand by it, if the intention of the Court were (as it plainly

was) that the "third count of the amended declaration", not "as amended," but as it was before the last amendment, should stand. The plea being ostensibly filed to the whole count as finally amended, when the plaintiff stood by her demurrer to that plea there was, under the strict rules of pleading, no issue of fact left on that count or any part of it for the jury to try. But the strict rules of pleading were not followed.

The count as it first stood in the amended declaration we think would have been bad for duplicity if tested by a special demurrer; but it was not so tested, but had been on January 8, 1913, although the other counts of the amended declaration had been demurred to, met by a plea of not guilty by the defendant, and on the 20th of February, 1913, the plaintiff had filed a similiter to said plea.

The count as it stood when issue was thus joined on it has been hereinbefore fully abstracted. On April 2, 1913, leave was given to the plaintiff "to amend the third amended count in the declaration filed in said cause" and a paper was filed entitled in the cause and headed: "Amendment to 3rd Amended Count." It proceeded:

"On page 8, last paragraph extending on page 9 of Amended Declaration strike out the following:
Sec. 1963. FENDERS." (Then follows the Section as we have before given it)
"and insert in its place the following:

Section 2165. FENDERS: Every person or corporation controlling, operating or owning any street railway in the city shall equip and provide each and every car used on such street railway with fenders, which shall be of a type and design satisfactory to the Commissioner of Public Works and which shall be securely attached to the front end of such car so as to guard passengers or pedestrians from being injured or thrown under the wheels of such car in case of a collision or other accident."

It was to this "amendment" and not the "Third Count of the Amended Declaration as Amended" that the Court

apparently deemed the plea of the Statute of Limitations was pleaded, for the order entered September 13, 1913, was:

"On motion for defendant it is ordered that the demurrer of the plaintiff to the plea of the Statute of Limitations filed by the defendant April 4, 1913, be overruled. Plaintiff objects and excepts to ruling of Court and elects to stand by demurrer. On motion of attorney for defendant suit dismissed as to the amendment to the third amended count filed by plaintiff on April 2, 1913, and issues being joined herein it is ordered that a jury come, etc."

During the trial objections to evidence concerning fenders were made by the defendant's counsel on the ground that the third count of the amended declaration was no longer in the case, but they were overruled by the trial Judge. When the motion for a new trial was heard, counsel for the defendant insisted on the point, but the Court replied to him that the "plaintiff tried to amend the third count but did not amend it. The plea of the statute was sustained as to that amendment. * * * The plaintiff did not attempt to draw an amended third count. He simply attempted to file an amendment to the third amended count. You already had a plea of the general issue to the third amended count." After an extended discussion the Court said:

"There is no question that the Court held the third amended count of that date was still in the case. The case was tried on that theory. * * * It was assumed all through the case that the third amended count was in the case."

After full consideration of the matter by the trial Judge he entered the following order October 12, 1913:

"On motion of the attorney for plaintiff the order made and entered September 13, 1913, by the Court is hereby amended and corrected so as to read as follows:

On motion of defendant it is ordered that the demurrer of the plaintiff filed May 13, 1913, to the plea of the statute of limitation filed April 4, 1913, is overruled, to which ruling the plaintiff excepts and elects to stand by his demurrer.

Defendant asks for judgment on the plea of the Statute of Limitation filed April 4, 1913, and that the suit be dismissed as to the third amended count filed November 13, 1911, as amended April 2, 1913, and the Court denies the motion of the defendant to dismiss the suit as to third amended count

filed November 10, 1911, as amended April 2, 1913, to which ruling defendant excepts and the Court dismisses the suit as to the amendment to the third amended count filed April 2, 1913; and the Court further orders that the third amended count filed November 10, 1911, and the plea of the general issue of defendant thereto and the replication of the plaintiff thereto stand, to which the defendant excepts and thereupon the defendant moves the Court to vacate the foregoing order, which motion is by the Court continued."

November 28, 1913, the motion last referred to was denied in a "judgment order" entered on that day, which reads in the transcript of record before us as follows:

"Auguste Wende, Administratrix
of the Estate of Ella Wende, deceased,
vs. Case No. 306672.
Chicago City Railway.

On motion of attorney for plaintiff motion of deft. to vacate order of Oct. 18, 1913, denied. Exception by deft. Motion of plff. to file additional count to conform to proof denied. Exception by plff.

Motion for a new trial denied. Exception by defendant. Motion in arrest of judgment by deft. denied. Exception by deft. Judgment on verdict \$3000. Three Thousand Dollars and costs of suit. Exception by deft. Appeal prayed by defendant and allowed to Appellate Court, first district, bond \$3500.00 thirty days and bill of exceptions in thirty days. \$3000."

It may be noted here that this "judgment order" is alleged by the defendant to be void because of the deficiencies and irregularities in its form. It certainly is palpably irregular in form, (suggesting some caustic words of the Supreme Court in *Martin v. Barnhardt*, 39 Ill., 9); but we should hesitate to say that it was insufficient, especially as a bill of exceptions in the cause recites that the Court rendered judgment on the verdict against the defendant for \$3000 and costs, and our Statute of Amendment and Joinders provides that a judgment shall not be reversed or impaired "by any infirmity in entering judgment or making up the record thereof."

But in any event, if such a judgment is affirmed, the cause may be remanded to the trial Court with leave to the plaintiff to move for the correction of the form thereof.

To return to the discussion of the pleadings and

orders in the matter of the third amended count. We have no doubt of the technical accuracy of the position of the defendant, that the plea of the Statute of Limitations was to the count as finally amended, not to the final "amendment." It follows that the trial Judge was in error in his rulings in relation thereto and to the proper technical effect of his overruling the demurrer to the plea.

But not every error in procedure justifies reversal. It is also clear to us that the plea could not have been good to the count as finally amended, taken as a whole, and that the demurrer should have been sustained to the plea; that the ruling of the trial Judge on it was not only understood by him to apply only to the final amendment, leaving the count as it originally stood in the amended declaration filed November 10, 1911, and the plea of the general issue thereto still in the case; but that ^{also} ~~that~~ [^] for all practical purposes they were not only by the Court, but by counsel for both parties, so treated until the motion for a new trial came to be argued. The plaintiff did not offer the ordinance set forth in the count under the heading Sec. 1963, but did offer that portion of Section 10 of the Franchise Ordinance, so-called, which was also set forth in that count; and although the counsel for the defendant objected to its introduction on the ground that "count three" was "out of the pleadings" in his opinion, yet when the trial Judge promptly signified, as he did then and at all times during the trial, not only that he considered the third count of the declaration of November 10, 1911, in the cause, but as presenting a very important issue therein, the counsel for the defendant as promptly met that position with contentions centering on fenders and the rights and duties of the Company under the ordinances in

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relation thereto.

As counsel for plaintiff notes in his argument here, the counsel for defendant during the trial "offered in evidence parts of the same ordinance" (i. e. the "franchise ordinance") "or asked counsel to stipulate that parts of the same ordinance should go in the record for the benefit of the defendant, and cross-examined the witnesses of plaintiff on the fender question", "and argued the matter to the jury."

Although the record does not so explicitly state, it may, we think, be legitimately inferred that the "additional count" which the plaintiff moved on November 28, 1913, for leave to file "to conform to proof" was the third count of the amended declaration of November 10, 1911, and that the only reason for the denial of the motion was that the Court held that the count and the plea of the general issue to it had been before the court and jury at all times, and the cause had been tried on that theory.

Therefore, we agree with counsel for plaintiff that what the Court did, although irregularly and erroneously done, was merely "tantamount to allowing the plaintiff to strike the (proposed) "amendment" (of April 2, 1913) "from the files, and that the defendant ought not to benefit by errors in ruling on pleadings and procedure which did not in any sense surprise or injure it. We think the case here should be treated as the Court below and, indeed, as we hold the parties below treated it - as though the 3rd count of the amended declaration and the general issue pleaded to it were in the cause throughout.

So viewing it, we are brought to the only questions of importance and significance left in the case, namely: Was there, under the allegations of the third count, evidence of negligence on the part of the defendant to go to the jury, from

which the jury might find that such negligence existed, and if so, was there such evidence of contributory negligence on the part of Auguste Wende or her mother as to make it a matter of law that no recovery could be had?

It is true that an objection is made to one of the three instructions given at the instance of the plaintiff because, as it is said, "it assumes the negligence of the defendant." We do not think that it is obnoxious to this criticism or otherwise objectionable.

Objections were also made to the introduction of certain evidence concerning the fender upon the theory that the third count of the amended declaration and the plea of the general issue thereto were not in the cause. It is not necessary to discuss them separately. They fall if the count and plea are to be treated by us as making an issue in the cause. The objections made to the allowance of certain testimony regarding the condition of the body when found, and to the exercise of the discretion of the Court in allowing certain witnesses for the plaintiff to be recalled in rebuttal to testify to the condition of the fender and of the roadbed at the exact point of the accident, we do not consider very significant or material.

Returning, therefore, to the first of the questions we have stated - Was there evidence under the third count concerning the condition of the fender sufficient to go to the jury and justify them in their verdict? The body of the child was found under the fender. The trial Judge said in passing on the motion for a new trial: "The ordinance was in evidence that compelled the Company to have efficient fenders on their cars. This fender did not work; the child got under the car apparently without any interference on the part

of the fender. * * Here was a case where the car was going exceedingly slow and if the fender had worked the child could not have gone under the car."

That is the theory of the plaintiff. The evidence concerning the fender is that it was of the approved and indeed required style. If it did not work properly it was the fault of that particular fender which rendered it "unserviceable and inefficient." It was undoubtedly the duty of the Company to have the fender in working order. The car was just coming from the barn and should have been properly equipped. The position of the defendant is that the fender was in order, and it introduced evidence to the effect that this automatically working fender had actually worked as it was intended to when it had struck the body of the child. The "apron", that part that strikes the object on the tracks, had been thrown back and had caused the basket part of the fender designed to pick the object from the tracks before the wheels could pass over it, to be thrown down and to lie upon the rails. It contends that the probable reason the girl's body went under it was that her hand or foot had fallen into a depression between the tracks. The evidence, however, was conflicting concerning the fender and its situation immediately after the accident. Witnesses for the plaintiff testified that the fender was "up", not "down", after accident, which amounted in effect to saying that it "had to work," which indeed was the definite statement of one witness, which statement, however, was stricken out by the Court as a conclusion and incompetent. The same witness testified that he saw an employee of the defendant put the fender up after the accident.

We are not called on to say, in this conflict

testimony how as jurymen we should have been affected by the testimony, or to which witnesses we should have, in preference, imputed credibility, but only whether there was evidence from which the jury might as reasonable men conclude that the defendant had failed to have "an efficient and serviceable fender device" on that car at that time, and whether this was negligence which resulted in the death of the plaintiff's intestate. This question, like that of the alleged contributory negligence of the deceased, which is the next and last question to be considered, is a close one, by no means free from difficulty; but careful and repeated consideration of the evidence and the arguments of counsel leaves us of the opinion that we should not be justified in disturbing the verdict of the jury, assuming it to have been based on the issue presented by the third count of the declaration.

On the question of contributory negligence which, like that of the negligence of the defendant, is peculiarly for the jury, the jury were thoroughly and accurately instructed by the Court at the instance of, and in the manner requested by, the defendant. The jury found adversely to the defendant. It inhered in their verdict that they found that neither of the parents of the child nor the child herself was to be held guilty of negligence proximately contributing to the injury. We are not doubtful that they were fully within their right in so holding concerning the parents. No negligence certainly could be imputed to the father, who had nothing to do with sending the child upon the errand which resulted so sadly, and we should not feel ourselves justified in holding that as a matter of law a mother who sends a normal child of nine years for a few blocks on a necessary household errand through uncrowded streets, was guilty of negligence. Such a holding would affect perhaps a majority of the people whose household

necessities compel them to secure such assistance from their children.

As for the negligence of the child herself, it is a very difficult matter to exactly gauge in any case "the due care and caution" which, as the jury were correctly instructed in this case, is "that which might reasonably be expected under the same or like circumstances of a girl of" a given "age, experience and capacity to comprehend and avoid the danger" which may be shown from the evidence. It certainly is to the jury that this duty is primarily entrusted. In the present case there was evidence which we cannot say they might not as reasonable men believe, from which it could be legitimately inferred that it was a standing and unexpected fall of the little girl when between the tracks, which prevented her from safely crossing them before the car was upon her.

In such a case the risk taken by her in allowing herself insufficient time to escape in the case of such an accident, and her crossing the street elsewhere than at an intersection, cannot be judged as in the case of an adult, but only when taking into account her "age, experience, intelligence and capacity."

Other testimony in the case, it is true, would negative the theory of a fall between the tracks and would seem to indicate bewilderment, inattention or recklessness; but it was, we must hold, ^{a question} for the jury to decide, not only considering the number, but the interest, character and demeanor of the witnesses who testified to the various versions of the occurrence.

Close as we regard the case, we cannot feel that we should reverse the judgment of the Circuit Court, and it is accordingly affirmed. But the cause is remanded to the Circuit Court with directions to give leave to the plaintiff to apply for a correction of the judgment in form.

CHARLES S. COOK,
Defendant in Error,

vs.

JACOB O. CURRY and HARLAN B.
CURRY, Conservators of JACOB
O. CURRY,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

192 I.A. 132

MR. PRESIDING JUSTICE BROCK
DELIVERED THE OPINION OF THE COURT.

The defendant in error in this cause, Charles S. Cook, was the plaintiff below. He sued the plaintiff in error, Jacob O. Curry, in the Municipal Court of Chicago September 20, 1913, for \$564, alleged to be due for rent on a written lease. February 5, 1914, Jacob O. Curry was adjudged by the Probate Court of Cook County to be a feeble minded person, and Harlan B. Curry was duly appointed to be his conservator, "authorized and required to have the care of his person and estate." Harlan B. Curry duly qualified under the appointment and on February 11th appeared in the cause under an order of Court that he should so appear and defend the cause as conservator. This order is said to be erroneous by the plaintiffs in error, because it did not in terms make the conservator "a party defendant." We think the order and the intervention of the conservator were in strict accordance with the statutes of 1874 concerning Lunatics, etc., and concerning Abatement, as construed together by the Supreme Court in Scott v. Bassett, 194 Ill. 603.

The cause came on for trial in the Municipal Court before a Judge of that Court sitting with a jury March 6, 1914.

✓ By the evidence which was introduced by plain-

by
 tiff and defendant it was developed that on May 11th Jacob C.
 Curry at Allston, Massachusetts, signed a document presented
 to him by a firm of renting agents at Allston consisting of
 George F. Taft and Norman B. Waite. The document was headed
 "Rental Application and Agreement." The essential parts of
 the face of the document, which was signed at the foot of
 said face, as follows:

"Signature of applicant, J.C. Curry, Lessee (SEAL)

Accepted by, Taft & Waite, Agents for the Owners,"

are, after the date -

"Name, Jacob C. Curry as Lessee. * * * * *
 Family consists of 4 adults, 2 children " Applied for -
 Suite 1 - 36 Linden St., Allston. Owner, Charles S. Cook, as
 Lessor. Rent \$664 per annum payable \$47 monthly. Rent to
 begin June 1, 1910. * * * * *

Rental Agreement.

In making the foregoing application I hereby
 agree that upon its acceptance by the owner (or Taft and
 Waite, Agents) I am to hold said premises for the time and
 upon the conditions specified upon the back hereof, the lat-
 ter being hereby made a part of this agreement."

The back of the paper was headed:

"TERMS AND CONDITIONS OF RENTAL AGREEMENT."

Beneath this heading, besides conditions usual
 in a lease of an apartment, concerning underletting, use of
 premises, waste, repairs, etc., were the following provisions:

"Lessee agrees to pay rent to Sept. 1, 1910. In
 the event that Lessee desires to vacate premises at that date,
 written notice must be given to lessor on or before Aug. 1,
 1910. Failing so to do, Lessee is holden for rent until
 Sept. 1, 1911. If Lessee desires to vacate premises at last
 mentioned date, written notice must be given to lessor on or
 before August 1, 1911. Failing so to do, Lessee is holden
 for rent until thirty days notice is given as above outlined,
 to take effect on September 1 in any year, but this lease
 shall terminate in any event in twenty years from the date
 when rent commences.

The Lessor may terminate this agreement upon 30
 days written notice, to take effect on September 1, in any
 year at or after Sept. 1, 1910, but without waiving any
 right of the lessor to terminate for a breach of any of the
 other terms and conditions specified herein."

The evidence further shows that after the execu-
 tion of this document, Jacob C. Curry, whose family at the

time consisted of himself, his wife, his son, Oakley Curry, his daughter, Elsie Curry, and a widowed daughter, Mrs. Blair, and her two children, moved into the premises and took possession of the same. He lived there with the family before described until April 6, 1911, when he, and his wife and daughter Elsie Curry left the premises and came to Chicago, bringing their household goods with them. He left in the premises his son Oakley and his daughter Mrs. Blair with her children. Mrs. Blair's household goods were then in a storage warehouse in Chicago, but were shipped to her.

Jacob O. Curry when about to leave told Mr. Taft that inasmuch as business matters called him to Chicago, he and his wife were going there; that he might be gone one month and he might be gone six months, and that the rent in the meantime would be paid by his son, and if it was not, he (Jacob O. Curry) was perfectly good for it.

Jacob O. Curry did not return to the premises, but his son and Mrs. Blair and her children continued to occupy the apartments until September 1, 1913. Up to September 1, 1912, the rent was paid by the son or daughter. Monthly bills were sent each month to Jacob O. Curry, suite 1 - 36 Linden Street, Alton, and the son, Mr. Taft says, "used to drop in occasionally and either say he was short or else he would pay." From September 1, 1912, to September 1, 1913, at which last mentioned date Oakley Curry and Mrs. Blair and family moved out, no rent was paid.

In answer to the question put to Mr. Taft - "Will you state the circumstances under which the occupation of the premises ceased on September 1, 1913, by Mr. Curry's children?" he answered, "They simply moved."

Jacob O. Curry never at any time gave a notice of his election to terminate the lease in accordance with its

provisions, and no arrangement was made by the plaintiff or by any one for him with anybody but Jacob O. Curry regarding the tenancy in question. ✓

The foregoing being the matters of fact developed by the evidence, the trial Judge instructed the jury to render a verdict for the plaintiff for \$564. On the verdict rendered in accordance with the instruction, judgment was entered in favor of the plaintiff for this amount. To reverse this judgment the writ of error under our consideration was sued out. A Judge of this Court, after due consideration of the record, refused to make the writ a supersedeas August 7, 1914, and for the same reasons the Court now affirms the judgment. The points made by the plaintiffs in error in attacking it are without merit.

The document signed by Jacob O. Curry, which was followed by his taking possession of the premises, was a binding lease. It had all the necessary ingredients for a lease. The plaintiff Cook, who, the testimony of Taft shows, was the owner of the premises, accepted it and acted on it by allowing Curry to take possession and recognizing his tenancy. He ratified, if ratification was necessary, the signature of "Taft & Waite, Agents for the Owners." But it was not necessary, under the circumstances, that it should be signed by anybody but Curry to make it binding on both parties - accepted as it was by the owner.

The Statute of Frauds has no application to the case. It only requires that the contract or lease for a longer term than one year must be signed by the party to be charged.

Hillsperger v. Boyer, 217 Ill. 262;

McCormick v. Loomis, 165 Ill. App. 214.

There is no doubt in our mind as to the validity of the lease nor of the liability of the defendant under it; but it may be remarked that even had the tenancy been from month to month, as the plaintiffs in error's counsel insist it was, Jacob O. Curry would be liable so long as the premises were occupied by the members of the family that he left there; for there was no evidence whatever of any change of tenancy. It is indeed expressly negatived by the testimony.

The only other point made by the plaintiffs in error is that Taft and Waite were incompetent as witnesses and that their testimony should have been excluded because of the action of our Evidence Statute which says that with certain named exceptions no person directly interested in the event of a civil action shall testify of his own action or in his own behalf, in such action, when any adverse party defends as a conservator.

There is no evidence whatever that Taft or Waite was "directly interested" in this action.

There was no defense to the action shown and no error committed by the peremptory instruction to the jury, and the judgment is affirmed.

APPROVED.

20551

J. A. MATHEWS,
Defendant in Error

VS.

MATTIE JACKSON,
Plaintiff in Error.

ERROR TO THE

MUNICIPAL COURT

OF CHICAGO.

192 I. A. 194

FULL OPINION NOT AVAILABLE.

20556

J. A. MATHEWS,
Defendant in Error

vs

JOHN MORAN,
Plaintiff in Error.

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)
)
)
)
)
)

ERROR TO THE

MUNICIPAL COURT

OF CHICAGO.

192 I. A. 196

FULL OPINION NOT AVAILABLE

464 - 38796

GILLIAN H. DURANT,
Plaintiff in Error,

vs.

W. SCOTT MATTHEWS et al.,
Defendants in Error.

IN THE SUPREME COURT

OF THE STATE OF MISSISSIPPI.

1921 A. 203

MR. JUSTICE BRANKE DELIVERED THE OPINION OF THE COURT.

The relator, Durant, filed his petition for a writ of mandamus commanding the defendants to restore him to the office of Food Inspector. With the exception of the name of the relator and of the office held by him, the petition is a copy of the one filed in Brickson as relator against the same defendants, in which an opinion has this day been filed. The proceedings in the two cases were the same and the questions presented the same. For the reasons stated in the Brickson case, the judgment in this case is also affirmed.

AFFIRMED.

192/235

APR 13 1915

164 - 20478

ABRAHAM J. LIEBMAN,
Defendant in Error,

vs.

WILLIAM B. AUSTIN,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Liebman brought suit against Austin, claiming a breach of contract and recovered judgment for \$904. Austin denied making the contract. The principal question that arises is whether the verdict was manifestly against the weight of the evidence as to the existence of a contract, which, as claimed, was that in consideration of Liebman's forbearance to redeem certain premises from a foreclosure sale under a trust deed as to which he and Austin stood in the relation of second and third mortgagees respectively, Austin agreed to pay Liebman the amount secured by his mortgage. As one of the parties avers and the other denies entering into such a contract, we shall consider whether there is any fact or circumstance that corroborates one or the other.

One Watson Twichell was the owner of the premises which were situated on North Carpenter street, Chicago. He had encumbered them with five several trust deeds (called mortgages hereafter) to secure his promissory notes. One Kenny held those secured by the first two mortgages, Liebman that secured by the third and Austin those secured by the fourth and fifth. There was a foreclosure sale under the first mortgage. Liebman and Austin were parties defendant to the proceedings. Before they were commenced, the notes secured by the second mortgage were purchased by Austin, but, as admitted by him, were included in the note secured by one of his subsequent mortgages, and in his answer to the bill of complaint the rights he asserted were under the latter and not the former. Later,

when there was a settlement between Austin and the Twichells, it was recognized that the second mortgage had been eliminated by substituting one of the others therefor. The second mortgage having been practically satisfied by such a substitution, Liebman, after the foreclosure sale, had the prior lien, which, if Austin desired to redeem from the sale, furnished inducement for such a contract as Liebman claimed was entered into between them during the twelve-month period of redemption which expired August 16, 1910.

To corroborate Liebman's claim, a deed from Twichell's widow and son to Austin, dated October 1, 1910, and conveying other property on Harding Avenue, was introduced in evidence over defendant's objection. We think it was competent as tending to show an admission on the part of Austin of an obligation to pay Liebman the amount of his encumbrance.

The deed in question contains a recital that Austin is to assist ^{the} Twichells in procuring a loan on the Carpenter street property. "to take up the encumbrance now subsisting against said property on North Carpenter street, to-wit: A Master's certificate outstanding, aggregating the sum of about \$2700, and a trust deed outstanding to said Liebman, there being claimed to be due said Liebman about the sum of \$800, it being understood and agreed that the amount paid by said Austin to said Twichell and Twichell for the residue of the price of said Harding Avenue property is to apply upon the encumbrances of said North Carpenter street property."

As said deed also expressly provided that there should be deducted from the purchase price of the Harding Avenue property certain sums including the amount due on Austin's two mortgages on the Carpenter street property, and as such arrangement for their satisfaction left Liebman's as the only encumbrance on the Carpenter street lot to which the residue of said purchase price could be applied, the palpable inference from the above recital is that Austin was interested in providing for the satisfaction of the Liebman encumbrance. If not under obligation to do so, it is difficult to comprehend why

he had such a provision inserted in the deed. It is tantamount to an admission of such an obligation and tended to support Liebman's claim of a contract imposing it. There is nothing ambiguous about the provision, nor does it conflict with any other part of the deed; nor is there anything in the record warranting a different conclusion as to its meaning. With such admission against Austin's own interest tending to support Liebman's version we would not be warranted in holding that the preponderance of the evidence was manifestly against the verdict.

No points of law are raised that call for discussion. It is claimed that the contract comes within the statute of frauds; but, if applicable, it was not pleaded. As to a consideration for the contract, there can be no question that Liebman's promise not to redeem the property was a sufficient consideration to support Austin's promise to pay the debt. We find no reversible rulings on the admission or exclusion of evidence or prejudicial errors in the statements of plaintiff's counsel to the jury. As to the question of a duty on plaintiff's part to reduce the damages, even if it could be said to exist on the state of facts presented, it is in no way raised in the record, either by instructions given or refused, or otherwise. The judgment must, therefore, be affirmed.

AFFIRMED.

142/220

APR 13 1915

305 - 20664

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

NELSON KING,
Plaintiff in Error.

}
Error to
Criminal Court,
Cook County.
}
}

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record herein shows an indictment against plaintiff in error containing two counts, one charging the obtaining of \$30 by means and use of the confidence game and the other larceny of that sum, the waiver of the "felony charge" by the People, a plea of "not guilty of obtaining money by false pretenses," a waiver of jury trial by plaintiff in error, and an order adjudging the defendant guilty of the crime of obtaining money by false pretenses upon the indictment in the cause and a plea of guilty, and sentencing him to the house of correction for one year.

The mere statement of the record is sufficient to disclose the illegality of the conviction. The waiver of the "felony charge" eliminated both the charge of a confidence game and ^{that} of grand larceny, and left petit larceny as the only included offense for which the defendant could be tried under the allegations of the indictment.

The plea of not guilty was to an offense not charged nor included in the indictment, and hence one which the court had no jurisdiction to try, and, therefore, one for which it could not have sentenced the defendant even had he pleaded guilty thereto as, contrary to the record, is wrongfully recited in the order of conviction.

REVERSED AND REMANDED.

CHARLES B. STAFFORD,
ADOLPH J. SABATH,
HARRY C. LEVINSON and
ALBERT SABATH, doing business as
SABATH, LEVINSON & STAFFORD,

vs.

BARBARA VACEK, ANNA VACEK
and HATTIE VACEK.

APR 13 1915

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On October 5, 1914, there was filed in this court a transcript of the proceedings had in a case in the Municipal Court of Chicago, entitled as above, and the case was docketed, designating the parties respectively as appellants and appellees; but said transcript does not show that an appeal was taken, hence a motion was made to dismiss the cause for want of jurisdiction. Thereupon the parties who were plaintiffs below and against whom judgment was rendered obtained leave to and did file an additional transcript of proceedings, but it, too, fails to show any order allowing an appeal. It differs from the original transcript in that it shows in the order for judgment, entered March 7, 1914, a provision for filing a bond and a bill of exceptions, and contains an additional order entered March 30, 1915, since this court granted leave to file an additional record, which reads in full as follows:

"This cause coming on motion of attorneys for the plaintiffs, and the court being fully advised in the premises, it is hereby ordered that the following order be entered quoniam hic tunc as of the date of final judgment in the above entitled cause, appeal prayed and allowed."

Whatever this may mean, there being nothing in the record to show an appeal was actually prayed and allowed within the time prescribed by statute therefor, this additional order was wholly unauthorized and tantamount to the court's allowing an appeal more than a year after one could be allowed by statute. In other words, the court attempted to enter on March 30, 1915, more than a year

after it lost jurisdiction, an order as of March 7, 1914, that had, in fact, never been made. This was an entire misconception of its power and the office of an order nunc pro tunc, which is only to supply what actually took place but was omitted from the record. (Lindauer v. Pesas, 193 Ill. 456.) As no appeal was taken from the lower court and no writ of error was issued from this court, said transcripts have no place in this court, and, therefore, they will be stricken from the files and the suit will be dismissed and stricken from the docket.

SUIT DISMISSED AND STRICKEN FROM DOCKET.

102/248

APR 13 1915.

103 - 20415

GEORGE STUDTMANN,
Defendant in Error,

vs.

UNION GROVE CREAMERY COMPANY,
a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 7, 1914, George Studtmann, plaintiff, commenced an attachment suit in the Municipal Court of Chicago against the Union Grove Creamery Company, a corporation, defendant. In his affidavit for attachment plaintiff alleged that defendant was indebted to him in the sum of \$539.16, "for the value of goods sold and delivered during the years 1913 and 1914, and upon an account stated on the 6th day of March, 1914," and that said defendant "is about fraudulently to conceal, assign or otherwise dispose of its property or effects, so as to hinder and delay its creditors." The attachment writ was served on the defendant and certain personal property of the defendant was attached. The defendant gave a forthcoming bond for \$1,200, and the property attached was returned, and defendant entered a general appearance. In its affidavit of merits the defendant alleged that plaintiff's claim was incorrect and excessive and that there was no account stated on March 6, 1914, and denied that on March 7, 1914, or at any other time, defendant was about fraudulently to conceal, assign, or otherwise dispose of its property, etc. The case was tried before the court without a jury, and on March 23, 1914, the court found the issues as to the attachment and as to the merits against the defendant and assessed plaintiff's damages at \$538.16. On the same day the court adjudged that the attachment be sustained, that plaintiff have judgment on the finding against defendant for said sum of \$538.16, and that a special execution issue, to the entry of which

judgment defendant excepted and subsequently sued out this writ of error.

We think that the evidence clearly shows that at the time of the commencement of the suit the defendant was indebted to plaintiff in said sum of \$538.16 for certain merchandise theretofore sold and delivered to defendant.

As to the attachment issue we have carefully examined the stenographic report of the proceedings at the trial and we do not think that the evidence sufficiently shows that at the time the suit was commenced, or at any time, the defendant was about fraudulently to conceal, assign or otherwise dispose of its property so as to hinder and delay its creditors. No useful purpose will be served in here giving a summary of the evidence. We deem it sufficient to say that the trial court was not warranted under the evidence in adjudging that the attachment be sustained.

Accordingly, the judgment of the Municipal Court, wherein it was adjudged that plaintiff have judgment against defendant in the sum of \$538.16, together with costs, is affirmed, but the judgment of said court, wherein said attachment was sustained, is reversed. The costs in this court will be paid one-half by plaintiff in error and one-half by defendant in error.

AFFIRMED IN PART AND

REVERSED IN PART.

Finding of Fact. We find as a fact that the defendant, Union Grove Creamery Company, was not about fraudulently to conceal, assign or otherwise dispose of its property so as to hinder and delay its creditors at the time of the commencement of the suit or at any time.

192/249

APR 13 1915.

128 - 20441

FRED E. JAHF,
Defendant in Error,

vs.

THE ELITE LIVERY, a corporation,
and SNYDER TEAMING & TRANSFER
COMPANY, a corporation,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Fred E. Jahf, plaintiff, brought suit in the Municipal Court of Chicago, against The Elite Livery, a corporation, and Snyder Teaming & Transfer Co., a corporation, hereinafter called Snyder Co., to recover the amount due on a promissory note, payable to plaintiff and signed by The Elite Livery, per W. A. Snyder, president, as maker, and endorsed by said Snyder Co., per W. A. Snyder, manager, as guarantor. At the time of the trial, before the court without a jury, it was shown that the sum of \$309.99 was due plaintiff, and the court found the issues against the defendants and assessed plaintiff's damages at said sum and entered judgment for \$309.99 on the finding.

It was urged in the trial court that the defendants, severally liable upon the note, were improperly joined in the suit, and it is here contended the court erred in entering judgment against both defendants. There is no merit in the contention. (Secs. 7a and 7b, chap. 98 Hurd's Stat. Ill.; Schoenfer v. Tonmack, 97 Ill. App. 562, 567.)

On behalf of the defendant, Snyder Co., it was also contended in the trial court, and it is here contended, that it was not shown that said defendant's manager was authorized by the board of directors to guarantee the note, or that said defendant received any consideration therefor, and hence the act was ultra vires and said defendant is not liable. This contention is also

without merit. It appears from the statement of facts in substance that a petition in bankruptcy was filed against The Elite Livery, of which corporation said W. A. Snyder was president; that plaintiff was one of the creditors of The Elite Livery, and filed his claim in the bankruptcy court; that prior to the filing of said petition, and within four months, The Elite Livery had sold and delivered to the Snyder Co. all of its movable property, and a bill of sale evidencing the transfer was recorded; that the wife of W. A. Snyder was the owner of all the capital stock, excepting two shares, of The Elite Livery, and was also the owner of all of the capital stock, excepting two shares, of the Snyder Co.; that the creditors of The Elite Livery charged that the transfer of said assets to the Snyder Co. was fraudulent and void as to them; that in the bankruptcy proceedings a compromise settlement was effected whereby it was agreed that, in consideration that the Snyder Co. be permitted to keep said assets so transferred to it by The Elite Livery, the Snyder Co. would guarantee the notes of The Elite Livery given in settlement of the claims of the creditors of The Elite Livery; that thereupon The Elite Livery executed the notes and the same were endorsed and guaranteed by the Snyder Co., and the latter company kept said assets so previously transferred to it; and that the note sued on was one of said notes. It thus appears that the Snyder Co. received a consideration for the guarantee of the note sued on, and it was not necessary in view of the evidence that there be a resolution or vote of the board of directors of the Snyder Co. authorizing W. A. Snyder to endorse and guarantee the note. (Atwater v. American Exchange Bank, 153 Ill., 605, 620.) And the Snyder Co. is not in a position to invoke the defense of ultra vires. (Eckman v. Chicago, B. & O. Ry. Co., 169 Ill. 312, 322; Kadish v. Garden City Association, 151 Ill. 531, 538.)

Counsel for defendant in error here urge that this writ

of error was prosecuted for the purpose of delay, and ask that the judgment be affirmed with statutory damages, as provided by section 23 of chapter 33 of the Illinois Statutes. We are of the opinion that the writ of error was prosecuted for delay. The ^{and} contentions of counsel for plaintiffs in error were untenable/ de-void of merit, and a reversal of the judgment could not reasonably have been hoped for, and under such circumstances damages for delay may be properly assessed by this court. (Town v. Alexander, 185 Ill. 254; Potter v. Leviton, 199 Ill. 93, 95; Grossman v. Cosgrove, 174 Ill. 383, 384; Calumet Street Ry. Co. v. Lewis, 168 Ill. 249, 250.)

The judgment of the Municipal Court is affirmed, and in addition to the judgment for costs the clerk will enter judgment against the plaintiffs in error, in favor of defendant in error, for ten per cent. of the amount of the judgment recovered in the Municipal Court.

AFFIRMED.

142/251

APR 13 1915.

129 - 20442

THE WILLIAM HERELY COMPANY,
a corporation,
Defendant in Error,

vs.

THE ELITE LIVERY, a corporation,
and SNYDER TEAMING & TRANSFER
COMPANY, a corporation,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The facts of this case are the same as in that of Fred E. Jahp against these defendants (in which case, No. 20441, an opinion has this day been filed), except that the note here in question is payable to William Herely Company. This case was also tried before the court without a jury, and the court made the same finding and entered judgment against the defendants in the same amount, viz: \$309.99, as in the Jahp case. The same contentions were made in the trial court, and are made in this court, by counsel for defendants, and the decision of this court will be the same, as in the Jahp case.

Accordingly, the judgment of the Municipal Court is affirmed, and in addition to the judgment for costs the clerk will enter judgment against the plaintiffs in error, in favor of defendant in error, for ten per cent. of the amount of the judgment recovered in the Municipal Court.

AFFIRMED.

APR 13 1915

JOHN D. CASEY, Administrator
of the Estate of Julia M.
Dickinson, deceased,
Appellant,
vs.
CHARLES DEINET,
Appellee.

Appeal from
Superior Court,
Cook County.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 27, 1911, John D. Casey, plaintiff, as administrator of the estate of Julia M. Dickinson, deceased, brought suit in the Superior Court of Cook County against Charles Deinet, defendant, to recover damages in the sum of \$10,000. The declaration, filed July 14, 1911, consisted of three counts. The first count alleged in substance that, on February 11, 1911, defendant owned and had the management and control of premises known as No. 6927 Stony Island avenue, in the City of Chicago; that it was defendant's duty to keep and maintain said premises and the porch and railings in a safe and sound condition so that portions of the porch and railings would not give way and allow people rightfully in and upon said premises to fall, more particularly plaintiff's intestate; that defendant, not regarding his said duty, negligently and wrongfully permitted said premises and the porch and railings on the third floor to remain, and maintained and kept the same, in an unsafe, rotten and ruinous condition, which facts the defendant knew or by the exercise of due diligence could have known, and of which facts plaintiff's intestate was ignorant; that while plaintiff's intestate in the course of her duties and while exercising due care for her own safety leaned against the railing on said porch on said third floor, said railing, because of its aforesaid condition, gave way and plaintiff's intestate fell and

received injuries, in consequence of which she died on February 21, 1911, etc. The second count contained substantially the same allegations as the first count. The third count alleged in substance that it was defendant's duty to keep the railings on the side of the porch on the third floor of said building safely fastened and nailed so that said railings would not fall and give way and cause people rightfully in and upon the premises, more particularly plaintiff's intestate, to fall; that defendant, not regarding his said duty, negligently maintained and kept said railings in an unsafe and improperly fastened condition, which facts defendant knew or by the exercise of due diligence could have known, and of which facts plaintiff's intestate was entirely ignorant; that while plaintiff's intestate, on February 11, 1911, was leaning against the railing of the said porch on the third floor and was in the exercise of due care, etc., by reason of the unsafe and insufficient fastening of said railing to the uprights and building, the railing gave way, causing plaintiff's intestate to fall, etc. Defendant filed a plea of not guilty.

The case came on for trial, December 8, 1913, before the court and jury. Plaintiff's evidence was to the effect that plaintiff's intestate, a married woman and the mother of five children, had been accustomed to assist a tenant, named Mrs. Schubert, living on the third floor of said premises, in housework; that on February 11, 1911, the deceased had been working for Mrs. Schubert during the entire forenoon; that at the time of the accident deceased was leaning over the railing of the rear porch on said third floor engaged in shaking a rug, when a portion of the railing, about three feet long, gave way and she fell, for a distance of about twelve feet, upon the roof of an adjoining tin shop, receiving severe injuries from which she died on February 21, 1911; that upon an examination made immediately following the accident it was found that the ends of said railing where they were fastened to

the uprights were rotten and decayed; that the railing had been loose and insecurely fastened for about one month prior to the accident; and that said porch and stairways in connection therewith were used as a means of access from the ground to the apartment of Mrs. Schubert.

At the conclusion of plaintiff's evidence, on motion of the defendant, the court orally instructed the jury to find the defendant not guilty, not because of the insufficiency of the evidence, but upon the grounds, as orally stated by the court, that "the declaration contains no allegation of any facts from which the court can conclude that plaintiff's intestate was lawfully upon the premises in question or that the defendant owed her any duty," and that "the declaration does not state a cause of action." In accordance with the court's instruction, to the giving of which plaintiff excepted, the jury returned a verdict of not guilty and judgment against the plaintiff for costs was entered. To the entry of this judgment plaintiff excepted and prayed and perfected this appeal.

To the declaration in this case the defendant did not demur, but filed a plea of not guilty. Having pleaded to the merits we do not think that the sufficiency of the declaration can be tested in this manner, and we are of the opinion that the trial court erred in so instructing the jury and in entering the judgment. (Klofski v. Railroad Supply Co., 235 Ill. 146, 150; Swift & Co. v. Ruthowski, 182 Ill. 18, 23; Sell v. Fink, No. 20273, opinion by this court, filed January 26, 1915.) Furthermore, the oral instruction to find the defendant not guilty was a violation of section 73 of the Practice Act. (Daily v. Boudreau, 231 Ill. 228, 250.)

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

142154

APR 13 1915.

172 - 20486

E. DeLUE & CO., a corporation,)	
Defendant in Error,)	
vs.	)	Error to
D. D. SPEAR,	)	Municipal Court
Plaintiff in Error.	)	of Chicago.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 21, 1913, E. DeLue & Co., a corporation, brought suit in the Municipal Court of Chicago against D. D. Spear, defendant, on a written agreement, as follows:

"Chicago, June 7, 1911.

"I, D. D. Spear, hereby agree to rent the second floor of 3847 Cottage Grove from June 12, 1911, to April 30, 1913, from E. DeLue & Co., for \$40 monthly rental from June 1, 1911, and sign a lease for same. In addition I agree to pay \$350, in cash, \$5 at time of signing this contract and balance of \$245 on or before June 12, 1911.

(Signed) D. D. SPEAR,
E. DeLUE & CO.,
Incorporated. Seal.
Chicago, Illinois."

In plaintiff's statement of claim it is alleged that its claim is for money due from defendant as rent under and for breach of said written agreement; that defendant occupied said second floor of the premises until some time in the month of June, 1912, when he vacated the same; that the same stood vacant during the month of July, 1912, and up to and including the month of April, 1913; and that there is due plaintiff thereunder the sum of \$40 per month for 10 months, or \$400. It is also alleged that plaintiff has an additional claim against defendant for \$350, for 10 months' rent for the third floor of said premises covering the months of July, 1912, to April, 1913, both inclusive; that the rental agreed to be paid for the same by defendant was the sum of \$35 per month; and that defendant went into possession but afterwards, in June, 1912, moved out and the same stood vacant during the entire period.

Some of the defenses set forth in defendant's affidavit of merits are in substance (1) that under the provisions of said written agreement plaintiff was to furnish a written lease for the premises but that the same was not executed; (2) that defendant did not either occupy said third floor of the premises or enter into a verbal lease therefor with plaintiff; and (3) that each of the several supposed promises in plaintiff's statement of claim mentioned was an agreement not to be performed within the space of one year from the making thereof, and no memorandum thereof in writing was signed by the defendant, or by any person thereunto by him lawfully authorized.

The case was tried before court and jury, and at the conclusion of all the evidence the court directed the jury to return a verdict in favor of plaintiff in the sum of \$435, upon which verdict judgment against the defendant was entered. The court held that the sum of \$400 was due plaintiff under said written agreement of June 7, 1911, and \$35 for one month's rent for the third floor of said premises.

It appears from the evidence, in substance, that defendant was the president and principal stockholder of the Regal Hat Company and that he personally signed said written agreement of June 7, 1911; that during the month of June, 1911, he paid plaintiff the sum of \$250 mentioned in said agreement, also paid plaintiff the sum of \$40 as rent for the second floor for said month of June, moved into said second floor and continued to occupy the same, and paid \$40 each month as rent therefor, until the month of June, 1912, when he vacated said second floor; that shortly after he moved in, and during the month of June, 1911, the president of plaintiff prepared and presented to defendant for his signature a formal lease for said second floor, but that defendant refused to sign the same, saying, "We have an agreement; that ought to be good enough," and said lease was not signed, but defendant continued to pay, and

plaintiff received, said monthly rent as it fell due; that in December, 1911, it was verbally agreed between the parties that plaintiff would lease to defendant the third floor of said premises at a rental of \$35 per month and until April 30, 1913; that defendant moved into said second floor and continued to occupy the same, and paid the monthly rent therefor, until the month of June, 1912, when he vacated said third floor at the same time he vacated the second floor; that the rent for the month of June, 1912, for both floors was paid; and that during the month of June, 1912, defendant called on the president of plaintiff and stated that he desired to move the location of his business and proposed that he should pay plaintiff 3 months' rent in consideration that plaintiff cancel the contract or lease, which proposition plaintiff refused. The president of plaintiff testified that no written notice was given plaintiff by defendant of the latter's intention to vacate the third floor of said premises, and that after defendant moved out of the premises he advertised both of said floors for rent and employed a real estate agent in the endeavor to re-rent the floors, but that the same remained vacant until after April 30, 1913.

Counsel for defendant here contend that the agreement of June 7, 1911, did not amount to a written lease of the second floor of said premises, and that the court was not warranted under the evidence in instructing the jury to return a verdict in favor of plaintiff in the sum of \$455. We cannot agree with counsel. We think that said agreement contained all the essentials of a valid and binding lease and under the facts shown a tenancy was created in said second floor of said premises for the period up to and including April 30, 1913. (Illinois Life Inc. Co. v. Baifield, 124 Ill. App. 588, 589; Bradley v. Metropolitan Music Co., 29 Minn. 516; Holley v. Young, 66 Maine, 520; Cheney v. Newberry, 67 Cal. 125.) And we do not think the fact that defendant refused to sign a formal lease after he took possession of said second floor renders said written agreement any the less binding. (Bradley v. Metropolitan Music Co.,

supra, Cheney v. Newberry, supra; Faust v. Craig, 107 N. Y. Supp. 637; Jackson v. Fisselbrack, 10 Johns. 333.) And, although the verbal agreement as to the leasing of the third floor of the premises was an agreement not to be performed within the space of one year from the making thereof, nevertheless we are of the opinion that, defendant having entered upon the premises under said verbal agreement and having paid for a time the stipulated monthly rent as it accrued, plaintiff was also entitled to recover the sum of \$38, as rent for said third floor for the month of July, 1918, for reasons stated in Donohue v. Chicago Park Fair Co., 37 Ill. App. 555, 564, and that the court was fully warranted in directing a verdict in favor of plaintiff in said sum of \$465, and, the verdict being returned, in entering judgment thereon.

The judgment of the Municipal Court is affirmed.

ATTORNEYS.

1256

APR 13 1915.

122 - 30505

ANTON FUERST,
Defendant in Error,
vs.
OSCAR STONE and HERMAN SALZBERG,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

1256

STATEMENT OF THE CASE. The plaintiff, Anton Fuerst, in his original statement of claim, filed on December 23, 1913, alleged that his claim against Oscar Stone and Herman Salzberg, defendants, was upon an "account stated between the parties" about June 30, 1913, for \$100, of which amount \$25 had been paid, leaving a balance due of \$75. To this statement of claim the defendants filed an affidavit of merits in which it was alleged that they were not indebted to plaintiff in any sum, but that on the contrary plaintiff was indebted to them in the sum of \$25; that about June 30, 1913, plaintiff represented to defendants that he had procured for them a certain building on West 26th street in Chicago, for the sum of \$4,800, upon payment to him of \$100 for his services to be rendered in procuring said building; that defendants agreed to purchase said building for said sum of \$4,800 and thereupon said plaintiff \$25 with the understanding that if plaintiff procured said building for them defendants would pay plaintiff the additional sum of \$75, but that if plaintiff did not procure said building plaintiff would return to defendants said sum of \$25; and that defendants were ready, willing and able to purchase said building for said sum of \$4,800, but that plaintiff was unable to procure said building and has not returned to defendants said sum of \$25. The defendants also filed a statement of claim for set-off for said \$25. To this claim of set-off plaintiff filed an affidavit of merits in which plaintiff admitted that said sum of \$25 was so paid plaintiff, and that the property on West 26th street was not delivered by plaintiff to de-

defendants, but plaintiff alleged that said sum of \$25 was afterwards, at the request of defendants, "applied upon a prior indebtedness of defendants to plaintiff of \$100."

Upon the above statements of claims and answers thereto, the cause came on for trial, March 5, 1914, before the court without a jury. Before the trial was concluded plaintiff, on March 9, 1914, filed an amended statement of claim in which he seemingly abandoned his claim for an account stated, and in which he alleged that about May 1, 1913, defendants promised to pay plaintiff, "acting as a salesman for Joseph Streska, real estate broker in the City of Chicago," the sum of \$100 for "looking up for them any real estate bargain which should be approved by them and put through"; that plaintiff did look up and put through with defendants' approval a "real property bargain from one Alois Slunecko" and defendants became indebted "to plaintiff's principal" in the sum aforesaid, which sum defendants refuse to pay; that plaintiff "is the actual bona fide owner of aforesaid claim, same having been duly assigned to him about June 30, 1913"; and that there is now due plaintiff from defendants the sum of \$75.

To this amended statement of claim the defendant, Salzberg, filed an affidavit of merits on behalf of both defendants in which he alleged that plaintiff did not perform any services for defendants at their request, that plaintiff is not a licensed broker as required by the Chicago Code, sections 192-198 inclusive; that plaintiff was not acting as a salesman for Joseph Streska in negotiating said real estate transaction between defendants and said Alois Slunecko, and that said Streska was not a licensed real estate broker in Chicago; that in the transaction referred to plaintiff acted as the agent for said Slunecko and not for defendants; that the alleged claim of said Streska against defendants was not assigned to plaintiff; and that plaintiff is indebted to defendants in the sum of \$25 for cash paid as more fully set forth in defendants' claim of

set-off.

On March 21, 1914, the trial court found the issues against defendants and assessed plaintiff's damages at \$75, and entered judgment against defendants on the finding.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

It appears from the evidence that on June 30, 1913, plaintiff and defendants entered into a written contract whereby it was agreed that if plaintiff could procure the sale to defendants, for the sum of \$4,800, of certain premises, 3615 West 26th street, Chicago, defendants would pay the owner of the premises said sum, and would also pay plaintiff \$100 as commission for negotiating the sale. Defendants advanced to plaintiff \$25 to apply on said commissions. Plaintiff was unable to bring about the sale, and defendants demanded a return of said \$25, but plaintiff refused to return the same, claiming that it was to be applied upon a prior indebtedness of defendants to plaintiff of \$100. It further appears that on May 30, 1913, a contract was signed by Alois Slunecko and defendants, whereby Slunecko agreed to sell and defendants agreed to buy the premises at 3623 West 26th street, Chicago, at the price of \$10,000, and it was further agreed that of the \$100 earnest money deposited by defendants \$100 should be paid the "vendor's broker" for the services in procuring the contract. Plaintiff acted as the broker for Slunecko, the vendor, and the transfer was made and Slunecko paid plaintiff \$100. There was no provision in the contract for the payment by defendants of any brokerage fees to plaintiff or to anyone else. And both defendants testified that they never promised plaintiff or anyone else to pay any sum for commissions in their transaction with Slunecko. Plaintiff in his amended statement claimed that about May 1, 1913, the defendants promised to pay him \$100 for looking up any real estate "bargain" which should be approved by them and put through, and he testified to that effect, and

also that the Slunecko property was such a bargain. Both defendants denied that they made any such promise to plaintiff at any time.

Plaintiff, in his said amended statement, further claimed that when said alleged promise was made by defendants he was acting as a salesman for one Joseph Streska, and that on the consummation of the Slunecko transaction the defendants became indebted in the sum of \$100 to "plaintiff's principal," viz: Joseph Streska, which sum defendants refuse to pay, and that plaintiff is the owner of said claim, the same having been duly assigned to him. It thus appears that plaintiff is suing defendants, not on an original claim of his, but as the assignee and owner of a chose in action of his principal, Joseph Streska. But we find no evidence in the transcript before us showing any claim of Joseph Streska against defendants in any sum, or that any such claim had been assigned by Streska to plaintiff. It was necessary for plaintiff before he could recover on his claim, as finally stated in his amended statement, to show an indebtedness of defendants to Streska, and an assignment of the same by Streska to plaintiff. (Cum v. Illinois Steel Co., 162 Ill. App. 461, 465; 4 Cyc., 110.) Furthermore, one of the defenses, as stated in defendants' affidavit of merits, was that neither plaintiff nor Streska was a licensed real estate broker, and it was not shown that either had a license from the City of Chicago, although it appeared that both were engaged in the real estate business in said city. And, in our opinion, the finding and judgment are not supported by the evidence. It however clearly appears, both by plaintiff's admission in his affidavit to defendants' claim of set-off and by the evidence, that plaintiff is indebted to defendants in the sum of \$35.

The judgment of the Municipal Court will be reversed and judgment will be entered here for \$35 against Anton Fuerst in favor of Oscar Stone and Herman Salzberg.

REVERSED AND JUDGMENT HERE.

Findings of Fact. We find as facts that at no time subsequent to May 30, 1918, did Joseph Straska, or the plaintiff, Anton Fuerst, have any claim in any amount against the defendants, Oscar Stone and Herman Salzberg, for services or for brokerage commissions; that Straska at no time assigned any claim or chose in action against defendants to plaintiff; and that defendants are not indebted to plaintiff, individually or as assignee of Straska.

104-51

APR 13 1914

202 - 20523

MARGARET F. GLOSSON,	Appellant,	}	Appeal from Superior Court, Cook County.
vs.			
MARTIN H. GLOSSON,	Appellee.		

STATEMENT OF THE CASE. This is an appeal from a decree of the Superior Court of Cook County, entered March 9, 1914, dismissing the amended bill of Margaret F. Glosson, complainant, for want of equity. This bill, filed December 23, 1913, was in the nature of a bill of review, and complainant prayed that a decree of divorce, etc., entered by the said Superior Court in her favor on April 30, 1912, be set aside. Her original bill was filed on March 19, 1913, to which defendant demurred and the demurrer was sustained.

The amended bill was not sworn to. Complainant therein alleged in substance that on August 11, 1908, she was lawfully married to the defendant at Kenosha, Wisconsin; that on March 14, 1912, defendant, by his cruel treatment hereinafter mentioned, and by the "threats and coercion" of his agents, "caused your oratrix to file" in the Superior Court of Cook County a bill for divorce against defendant on the ground of extreme and repeated cruelty; that on April 30, 1912, said cause was called for trial, at which time both parties were present by their solicitors and complainant testified in open court to the acts of cruelty as set forth in said bill; that the trial resulted in a decree, "procured at the instance of the defendant" on April 30, 1912, which purported to dissolve the said marriage; that complainant begs leave to refer to said pretended decrees, etc., and "to make said decree and all of the proceedings a part hereof, as though set forth herein at length"; that said pretended decree ordered that complainant should

receive \$1,800 in full of all alimony, "\$350 for solicitor's fees and \$150 for certain incidental expenses, which amounts "were paid and the records were satisfied in open court"; that out of the amount received by complainant she was compelled to pay debts to the amount of \$500 incurred prior to the entry of the decree, and that a portion of the remainder has been spent in paying doctor's bills and defraying necessary living expenses.

In the 4th paragraph of the bill complainant alleged that the filing of said bill for divorce, and the proceedings had thereafter culminating in said purported decree, "was not her free and voluntary act and deed, but was done at the instance and was brought about by the fraud, coercion, duress and undue influence of the defendant"; that complainant filed said bill for divorce at a time when she "was ill, unable to work for a livelihood, was without means or friends to support her, and was actually in need of the necessities of life, and was actually starving, and had but meagre food for several weeks prior to the hearing." She further alleged in substance that defendant had treated her in a cruel manner, and in February, 1911, refused to live with her; that she took a position as cashier in a barber shop in Chicago; that shortly thereafter an attorney employed by defendant informed her that a divorce from defendant was the only settlement of her domestic troubles that could be made; that subsequently she employed a Chicago attorney and requested him to see defendant and effect a reconciliation, if possible, and if not to procure separate maintenance for her; that said attorney did not start any litigation but succeeded in obtaining from defendant \$75 per month for two or three months; that in July, 1911, defendant stated to complainant over the telephone that he would send her \$65 per month for one year and that she would have to be content with that or get nothing; that in September, 1911, she went to Seneca Falls, N. Y., for her health, and while there received \$65 from defendant for the Octo-

ber allowance; that in November, 1911, she was notified by her said Chicago attorney that no more money would be sent to her until she applied for and obtained a divorce; that she telegraphed and wrote defendant requesting her November allowance but received no reply from him; that she pawned her diamond ring to get sufficient funds to return to Chicago, and upon arriving in Chicago employed another attorney who filed a bill for separate maintenance in her behalf against defendant; that no service of process in said suit could ever be made on defendant; that during the winter of 1911 and 1912 she only received the sum of \$65 from defendant, designated as her November, 1911, allowance; that in order to live she was compelled to pawn her watch and other personal articles and borrow money from friends, and existed in consequence under the most miserable circumstances; that by reason of the long continued inhuman treatment by defendant, and the physical illness and mental anguish she suffered by reason thereof, she was "mentally incompetent to transact business or consent to file a bill for divorce"; that defendant, knowing the mental condition of complainant, "conspired with his attorney and one William Schroeder" of Kenosha, Wisconsin (who was employed by the same firm that employed defendant), to cause complainant to file a bill for divorce, and they induced complainant to file such a bill, under an arrangement whereby defendant was to pay complainant \$1,500 and make complainant the beneficiary in a life insurance policy on the life of defendant for \$12,000; that defendant did not have his life insured for \$12,000, or in any amount, in favor of complainant; that said Schroeder telephoned complainant and stated that he would see that his employer kept the defendant out of the jurisdiction of the court indefinitely unless complainant would continue with the divorce proceedings, and that complainant would never get a cent of money from defendant; that as soon as the bill for divorce was filed the defendant entered his appearance in said suit by his attorney; that said bill for divorce was filed, and said pretended

decree of divorce was procured, pursuant to said conspiracy to accomplish such end and purpose, which conspiracy was entered into between defendant, his said attorney and said Schroeder, and "to which your oratrix was not a voluntary party, but because of the paralysis of her will and the mental incompetency under which she was suffering she was unable longer to resist the attacks of her husband, and permitted defendant to carry out his designs; and that said pretended decree of divorce was procured from said court at the special instance and through the instrumentality of the defendant."

Complainant further alleged that the acts of cruelty testified to by her at said divorce trial "were true," and that said acts were only a small part of the physical torture which defendant inflicted upon her in order that he might force her to secure a decree of divorce; that "owing to her mental condition and paralysis of the will she did not testify fully as to all the facts"; that if at the time of the trial she had had control of her will power, and had been in proper mental condition she would have disclosed said conspiracy; and that "in her mental condition she was afraid that she would remain in actual need of the necessities of life unless a decree for divorce was obtained."

Complainant further alleged that she did not file a motion to open said decree or prosecute an appeal "because she was compelled to devote her time to regain her mental and physical health," and that "after she had sufficiently gained her mental poise to fully comprehend the situation into which she had been thrust, she consulted a lawyer and was informed as to her rights in the matter and brought this her suit to annul said decree."

On January 2, 1914, defendant filed a written motion praying, for various reasons therein assigned, that the court dismiss complainant's amended bill. The motion was supported by the affidavit of the defendant, in which there was set out copies of the bill and answer in said action for divorce, the testimony

of all the witnesses in full and the said decree of divorce. On March 9, 1914, a hearing was had on said motion and the same was denied.

Thereupon the defendant on the same day filed a demurrer to said amended bill, wherein inter alia the following grounds of demurrer: (1) that the same does not set up facts and circumstances amounting to such fraud, coercion, duress or undue influence as authorizes the relief prayed for; (2) that the allegations are based on collusion and show that the acts complained of were mutual and accomplished only through the participation and consent of complainant; (3) that the bill shows that complainant accepted benefits under said decree of divorce; (4) that the bill contains no offer to do equity, and (5) that the bill shows that complainant has been guilty of laches not sufficiently explained. The court on the same day sustained said demurrer. Complainant elected to stand by the bill, and thereupon the same was dismissed for want of equity.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for complainant contend that the court erred in sustaining defendant's demurrer to the amended bill and, upon complainant electing to stand by the bill, in dismissing the bill for want of equity. We cannot agree with the contention, and are of the opinion, after a careful reading of the bill, that the action of the court was proper. The allegations that the defendant "caused your cratrix to file" her bill for divorce, that the decree of divorce "was procured at the instance of the defendant," that the filing of said bill and the subsequent proceedings culminating in said decree were "brought about by the fraud, coercion, duress and undue influence of the defendant," that she was "mentally incompetent to transact business or consent to file a bill

for divorce," that defendant "conspired with his attorney and one William Schroeder" to cause her to file the bill, and that "because of the paralysis of her will and the mental shock, stress, under which she was suffering she was unable longer to resist the attacks of her husband and permitted defendant to carry out his designs," are, we think, mere conclusions of the pleader. Sufficient facts are not stated to warrant these conclusions or any of them. "A bill to impeach a judgment or decree for fraud must specifically state the facts relied on as constituting the fraud. The pleader is not required to plead the evidence, but should state the specific facts which go to establish the fraud." (Stunz v. Stunz, 131 Ill. 308, 318.) "A party alleging fraud must state in his pleadings the facts relied upon to show fraud. Mere conclusions of the pleader without averments as to facts will not support an allegation of fraud." (Harrison v. County of Franklin, 228 Ill. 30, 48; Town v. First Nat. Bank, 118 Ill. App. 334, 337.) Furthermore, it appears from the allegations of the bill that the decree in question was exempt from being set aside on the ground of certain acts of cruelty on the part of the defendant, and it alleges that her testimony as to said acts was true. In Miller v. Receiver of Tri. Railway, 4 N. J. Eq. 343, 351, it is said: "A court of equity may unhesitatingly annul a judgment or decree which has been obtained by fraud, but, in order to justify such an exercise of power, it must be made clearly to appear that the judgment or decree has no other foundation than fraud." and in our opinion the allegations to the effect that complainant was in pecuniary distress and suffered vexation and annoyance by the acts of defendant do not show such coercion, duress and undue influence of the defendant as justifies the relief asked. (Adams v. Schiffer, 11 Colo. 15, 33; French v. Shoemaker, 14 Wall. 314, 338, Brewer v. Callender, 108 Ill. 22, 100.) The allegations of the bill of the divorce action are not fully in accord with the

facts, "owing to her mental condition and paralysis of the will." She does not allege that she was insane at the time or that she did not know what she was doing. Furthermore, we do not think that the bill sufficiently explains why, if the divorce decree was obtained by fraud, duress, etc., as charged, she waited for nearly a year before filing her bill.

In view of what has been said it is unnecessary for us to discuss defendant's point, assigned as cross-error, that the court erred in not sustaining defendant's motion to set aside complainant's amended bill.

The decree of the Superior Court is affirmed.

AFFIRMED.

agreed to reduce the price to that sum, and plaintiff promised to pay within a few days. Defendant while admitting the conversation regarding the reduction in the price of said bed-room furniture denied making any promise to pay \$100 therefor. Subsequently the \$380 check was returned to plaintiff with the endorsement thereon "Payment Stopped." Plaintiff thereupon telephoned defendant and inquired the reason for her action, and she replied that she did not want any of the furniture and requested plaintiff to come and remove the same from her premises. Plaintiff refused to do this and subsequently commenced this suit. Defendant testified on the trial that she had not used any of the furniture, etc., and that the same was in storage in one of the flats on her premises in the same condition as when received.

The theory of the defense was that the plaintiff's advertisement in the Sunday paper was a false and fraudulent one, that the representations therein contained caused her to believe that she could purchase of plaintiff a superior grade of furniture and furnishings, which had been but little used, at a low price, and that on account of plaintiff's fraud she was entitled to rescind the purchase, upon receiving back the money, and to also recover back the price paid. After a careful review of the evidence, however, we are of the opinion that, while the advertisement was calculated to deceive, and was in fact so, it was not fraudulent. We think that it is disclosed by the evidence that at all times that, after defendant had been advised of the true condition of business and affairs she continued to purchase the goods, and that the high quality of her goods and her reputation, and that the prices were not furnished and not selling them at a "bargain" price, that she received what she bargained for, and that the prices charged for the goods were fair and reasonable. We conclude that the rescinding and payment are contrary to the evidence, and that the weight of the evidence, taken as a whole, and as to each item,

that the trial court committed such error in his ruling on evidence as to require a reversal of the judgment.

Accordingly, the judgment of the District Court is affirmed.

AFFIRMED.

102/206

APR 13 1915.

31 - 20104

GEORGE H. HELBERG,
Defendant in Error,

vs.

BENJAMIN F. ODELL,
Plaintiff in Error.

} ERROR TO THE MUNICIPAL COURT
} OF CHICAGO.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought in the Municipal Court of Chicago by defendant in error, Helberg, against plaintiff in error, Odell, to recover the amount of \$27, claimed to have been charged as interest and attorney's fees upon a certain collateral note of Helberg wrongfully and without any basis. Two dollars of the amount was excess in interest and \$25 for attorney's fees. Upon reviewing the record, we think the judgment below is correct. The plaintiff in error had no right to tax \$25 for attorney's fees upon the payment of the note under the terms and provisions of the note. Helberg paid the note, protesting that Odell was demanding \$27 more than was due. Odell was not acting for Helberg; he was acting for Flack & Company, with whom he had an office. When Helberg paid the \$27 interest and attorney's fees demanded by Odell, he told Odell that he would sue him for the excess.

The judgment below is affirmed.

REVEREND.

JOHNSTON CITY COAL COMPANY,
Defendant in Error

ADOLPH KUECKEN AND MINNIE KUECKEN,
Plaintiffs in Error.

192 I. A. 267

FULL OPINION NOT AVAILABLE

192/268

APR 13 1915.

89 - 20400

LOUIS GOLDSCHMIDT and
EMATRICE SACKERMAN, co-
partners, doing business
as GOLDSCHMIDT & SACKERMAN,
Plaintiffs in Error,

vs.

GEORGE LESSARIS,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us a judgment of the Municipal Court of Chicago entered March 2, 1914, on a finding by the court without a jury against the plaintiffs. The parties will be designated herein as they were designated in the court below.

The second amended statement of claim filed July 25, 1913, alleges damages sustained by the plaintiffs from the fraud, deceit and breach of warranty of defendant in his sale to them of a moving picture theatre at 3506 South Halsted street, Chicago. It states the agreed selling price of the theatre was \$3000, \$1500 of which was paid on April 30, 1913, the date of closing the sale, and \$1500 of which was evidenced by plaintiffs' note for that amount due October 1, 1913, secured by a chattel mortgage which was signed by the plaintiffs but never acknowledged.

The charge in the statement of claim is that defendant represented and warranted to the plaintiffs just before and at the time of sale that the heating and ventilating system then in the theatre in every respect conformed to and complied with all the ordinances of the city of Chicago then in force and effect, prescribing and regulating heating and

ventilating theatres of the class purchased by the plaintiffs. It is stated that the defendant deceived and defrauded the plaintiffs and was guilty of a breach of warranty in that the ventilating system of the theatre at the time of purchase by the plaintiffs from defendant was not proper, lawful, satisfactory and fit, but at the time was and is unlawful, improper, unsatisfactory and unfit, and that the defendant had been informed before the sale of the theatre, and had been notified by the city of Chicago, that no renewal of the necessary license from said city to run and operate said theatre would be issued on July 1, 1913, unless the city was first furnished satisfactory evidence of the intention of the owner or lessee to supply a fit, proper, lawful and satisfactory ventilating system in and to said theatre on or before October 1, 1913, and a reasonable deposit made with the city to guarantee the same; all of which matters and things were known to the defendant before and at the time of the sale, but which he concealed from and neglected and failed to disclose to the plaintiffs; that the ventilating system in the theatre was and became worthless and of no value to the plaintiffs.

The defendant filed an affidavit of merits on August 13, 1913, stating that he believed he had a good defense to the whole of plaintiffs' demand and that the nature of his defense was that he did not make any promise or representations respecting the ventilating system installed in 3506 South Halsted street; that plaintiffs did not rely upon any representation of defendant as to the condition of the premises sold by him to them; or as to the ventilating system installed therein; but that plaintiffs carefully examined said premises and ventilating system, and the same was open to their scrutiny and examination before the purchase; and denies

that the defendant was notified by the city to instal another ventilating system in the premises, and no such information was concealed from plaintiffs by defendant; that plaintiffs suffered no damages through or by any fraudulent act, misrepresentation or breach of warranty on part of the defendant. The defendant admits that he took possession of the theatre from plaintiffs May 27, 1913, as alleged in the statement of claim, and claims to have done so by virtue of said chattel mortgage, and denies all matter of conspiracy, fraud, deceit, misrepresentation and breach of warranty, and denies that the plaintiffs suffered any damage due to his unlawful act.

Much space is occupied in the brief and argument of plaintiffs in error based upon certain alleged rules known as Rules 19 and 20 of the Municipal Court, and admissions of facts by the defendant in his affidavit of merits based upon the provisions of the above rules of the Municipal Court. No rules of the Municipal Court appear in the record and it has been repeatedly held that this court does not take judicial notice of the rules of the Municipal Court. That part of the argument, therefore, based upon the provisions of the rules of the Municipal Court, cannot be considered by us.

No propositions of law were submitted to the court to be held by the court in considering the case, and, therefore, no questions of law are before us for review. The only question presented by the record which is argued in the brief and which we can consider is the question as to whether the judgment is against the weight of the evidence. Upon reviewing the evidence preserved in the record we find no reason for saying that the judgment is against the weight of the evidence. We do not think the evidence shows that the defendant was guilty of any fraud, deceit or breach of warranty in the sale of the theatre to the

plaintiffs. The plaintiffs inspected the theatre, inspected the heating and ventilating system and made inquiries in regard to the same at the city offices of the city of Chicago and pursued their own investigation to the extent they thought it necessary with reference to the heating and ventilating apparatus, and did not rely upon any statements, warranties or representations made by the defendant. The witnesses were before the trial court and the Judge of that court had an opportunity of studying the witnesses while they were delivering their testimony, and we cannot say that his conclusions upon the evidence were against the manifest weight of the evidence.

The judgment is affirmed.

APPROVED.

have been employed to negotiate the transaction in connection with which his services were rendered." (19 Cyc. 217; Day v. Hale, 50 Ill. App. 115.)

"The fact that an owner of property consents to the rendition of services of a broker, which result in a sale of the property, does not create an implied contract of employment and so entitle the broker to a commission, where the services were unsolicited." (19 Cyc. 219.)

The evidence does not sustain the judgment of the Municipal Court. The court, therefore, erred in rendering a judgment in favor of defendant in error and against the plaintiff in error. The judgment is reversed.

REVERSED.

FINDING OF FACT.

The court finds that plaintiff in error, Frank Opava, did not employ Frank M. Turek, defendant in error, to negotiate a sale of his real estate; that Turek was the agent in the negotiations of Stanley Maisel, and acted in his interest, and was not the agent of plaintiff in error, and plaintiff in error is not indebted to defendant in error for services rendered by him.

192/271

APR 22 1915

72 - 19863.

THOMAS CHVATAL and BARBARA)	
CHVATAL,	)	ERROR TO
Defendants in Error,)	
vs.	)	MUNICIPAL COURT
)	
	)	OF CHICAGO.
DEV (LION) HOMESTEAD ASSOCIA-)	
TION, a Corporation,)	
Plaintiff in Error.)	

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Defendants in error recovered a judgment for \$200 in the Municipal court against the plaintiff in error, a building and loan association, in a suit brought to recover the withdrawal value of twelve shares of stock in the association, belonging to defendants in error. The association did not deny the fact that defendants in error owned the stock and had given notice of their desire to withdraw the value of the same, but claimed that the money had been paid to them in this way: that a voucher for the amount due was issued to them and that they indorsed it over to the treasurer as a personal loan to him. This was denied by defendants in error. It appears that some months after this alleged voucher was drawn, the treasurer disappeared.

It is urged that the verdict is contrary to the weight of the evidence. We have examined the evidence in the light of the arguments of counsel, and are unable to agree with this contention. The evidence was conflicting; the alleged voucher had been lost; the genuineness of the indorsement upon the voucher was not sworn to by any witness; and under all the circumstances, we think the jury were justified in accepting the version of defendants in error rather than that of the officers of the defendant association.

It is claimed that the court erred in its oral instructions. We cannot consider the alleged error for the reason that the record shows that no objection of any kind was made to any part of the instructions. However, a cursory examination of the instructions

in the light of the objections here made, seems to show that the objections are not well founded, in any event.

The judgment of the Municipal court will be affirmed.

RECORDED.

311 - 2357.

HARTY BRON. & HARTY CO., a
corporation,

Appellee,

vs.

CALDWELL-BELL & CO., a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

1921A 281

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Appellant had a contract with the city of Chicago for the construction of a fire engine house, and, on May 21, 1912, sublet the millwork to appellee. By the terms of the subcontract, all the millwork was to be delivered at the building not later than June 18, 1912. None of it was, in fact, delivered up to that time, and most of it was delivered during the months of August and September, the last delivery being made on September 27, 1912. The contract price was \$1850. A payment of \$500 on account was made on September 17, 1912, which, with credits amounting to \$118 for work omitted by agreement, was all that was ever paid on the contract. Appellee brought suit for the remainder, claiming the sum of \$1,042.30 and interest. Appellant's defense was that it had sustained damages to an amount exceeding the amount claimed by appellee because of appellee's delay in furnishing the materials. Upon this issue, a jury returned a verdict in favor of the plaintiff for the full amount of its claim, and judgment followed. The defendant appeals.

Appellant complains that the verdict is manifestly contrary to the preponderance of the evidence, that the court erred in admitting certain evidence, and that the oral instructions were inaccurate and misleading. It will only be necessary, however, to consider the last of these contentions, for the reason that after an examination of the evidence in the record, we are of the opinion that the merits of the case are, to say the least, sufficiently

doubtful to make it important that the instructions should be accurate and free from ambiguity.

While it was not denied that the plaintiff eventually furnished all the materials called for by the sub-contract, yet there is considerable evidence tending to prove that the plaintiff did not proceed with reasonable speed under all the circumstances. Many letters were introduced from which it appears that the defendant made repeated requests for materials, and made frequent complaints of the plaintiff's delays. The chief witness for the plaintiff admitted, on cross-examination, that the defendant made "scores of requests" for the more prompt delivery of material. There is evidence tending to prove that most of these requests were ignored by the plaintiff. There was evidence tending to prove that the building was practically completed, except for the millwork, early in July, and that defendant desired to turn over the building to the city on August 1st, but was prevented from so doing by the failure of the plaintiff to complete its part of the work. There was also evidence tending to prove that on account of the failure of the plaintiff to furnish the material as requested, it cost the defendant more than it would otherwise have cost, to finish the building. It is claimed by appellee that it clearly appears from the evidence, that the time limit specified in the contract (June 15, 1912) was waived by the conduct of the parties. Conceding, but without deciding, that this is true, the law nevertheless imposed upon appellee the duty of completing its contract within a reasonable time thereafter. (Graveson v. Tobey, 75 Ill. 540; Pittsburg Iron & Steel Mfg. Co. v. National Tube Works Co., 184 Pa. St. 391; McLewen v. American Lumber Co., 121 U. S. 575.) That is a reasonable time, is a question of fact for the jury, under all the circumstances in evidence.

The court instructed the jury that the plaintiff was obliged, in order to comply with its contract, to deliver all the material called for in its contract by June 15, 1912, unless it was prevented from so doing by the defendant; that the defendant was entitled to recover as damages all expenses incurred by it by reason of any delay on the part of the plaintiff; and that if the jury find from the evidence, that the defendant would have completed the building on August 1, 1912, except for the delay in the delivery of the millwork, then defendant was entitled to recover its expenses for keeping watchmen and other employees at the building after that date. No objection was made to this portion of the oral charge. The court then told the jury, however, that if they believed, from the evidence, that the failure to deliver the millwork "by June 15, 1912," was due to the fault of the defendant "in not having the building sufficiently advanced to permit measurements" to be taken, or any other reason not attributable to the plaintiff, or if the defendant did not know and could not inform the plaintiff until after June 15, what materials and what sizes and dimensions it wanted the plaintiff to furnish, then defendant should not be allowed any deduction on account of the fact that materials were not furnished by June 15. The defendant excepted to this portion of the charge, and also specifically excepted "to the failure to instruct that if any delay was caused subsequent to June 15th by reason of the default of the plaintiff, that the defendant is entitled to recover damages for all the time defendant kept men on the job and for all expenses caused by reason of such delay on the part of the plaintiff."

Apparently the court felt that the first portion of the instructions sufficiently covered the point thus suggested by defendant's counsel; and if it were clear from the evidence that there had been no unreasonable delay on plaintiff's part subsequent to June 15, 1912, or if it were clear that such delay caused the defend-

ant no additional expense, we would be inclined to hold that the refusal to instruct as requested was harmless error. In view of the fact, however, that there was evidence tending to prove that even though the specified time limit was waived, the plaintiff's part of the work was unreasonably delayed after June 15, 1912, we think the instructions as given were ambiguous and misleading. The jury may well have understood therefrom that if the specified time limit was waived and the plaintiff's work was eventually completed and accepted, then no delay on the part of the plaintiff occurring subsequent to June 15, 1912, would constitute a defense, no matter how prolonged it was, or how expensive to the defendant. Such is not the law, and we are unable to say that the result would have been the same if the instructions had been free from the ambiguity mentioned.

It is urged, however, that the defendant was precluded from making this defense for the alleged reason that it did not comply with the terms of its contract with reference to payments as the work progressed. The contract provided that payments should be made "on the basis of 35% of the value of labor and material delivered and in place, as allowed by the architect's certificates." The only architect's certificates in evidence are those given from time to time, to the defendant by the city's architect, and these do not show the "value of labor and material delivered" by the plaintiff. For aught that appears from the evidence, the payment of \$500 in September, together with the credit of \$111 above mentioned, may have been all that was due to the plaintiff at that time under these provisions of the contract. The record does not support this contention of appellee.

For the reasons stated, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

381 - 20320.

R. A. SMITH,
Appellee,

vs.

THE W. C. REEBIE & CO.,
a corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

192 I.A. 283

MR. JUSTICE WOOD delivered the opinion of the court.

Appellee stored his household furniture in a warehouse conducted either by appellant, a corporation, or by W. C. Reebie & Bro., a partnership. Appellee claims that at the time the goods were stored, it was agreed that they should be stored in a fireproof room, or a room with steel-lined walls, and that he paid a higher storage charge on that account. The goods were not put into a fireproof room, but into a room with wooden walls, where they were destroyed by fire, without any negligence on the part of appellant. This suit was brought to recover the value of the goods burned, and the case was tried upon the theory that appellant had broken its contract, and that the proximate result of such breach was the total loss of appellee's goods. A verdict was rendered in favor of appellee for \$450, and from a judgment entered on that verdict, the defendant appeals.

It is first urged that assuming such a contract was made as was claimed by appellee, the breach of such contract was not the proximate cause of the loss of appellee's goods. In support of this contention, the case of McKee v. Hill, 126 Ill. App. 349, is cited. In that case, a warehouseman agreed to store the plaintiff's goods in an inside room of his warehouse. The goods were at first placed in that room, but afterwards, without the knowledge of the plaintiff, they were removed to an outside room, where they were damaged by a fire that originated in another building and spread to the warehouse. The court held that the fire, and not the defend-

ant's breach of contract, was the proximate cause of the damage to the plaintiff's goods, and for that reason held that the warehouseman was not liable under the facts shown in that case. The opinion of the court recognizes, however, that the general rule is that a warehouseman is liable for the consequences of any breach of his contract "which might have been foreseen and expected as the result of such breach." The opinion quotes the following language from the opinion of our Supreme Court in Fent v. I. P. & N. Ry. Co., 58 Ill. 349, (which, in turn, is a quotation from ²Parsons on Contracts, 456): "We have been disposed to think that there is a principle derivable on the one hand from the general reason and justice of the question, and on the other applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is, that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration."

In Phillips v. Dickerson, 85 Ill. 11, it was said, quoting from Wayne on Damages, p. 15: "The first, and in fact the only inquiry, in all these cases, is, whether the damage complained of is the natural and reasonable result of the defendant's act. It will assume this character if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties." (Italics ours.)

In the case of McRae v. Mill, supra, there was apparently no evidence tending to prove that the inside room selected by the plaintiff was any more secure from fire than the room to which the goods were removed, except the mere fact that the latter room was an outside room. Nor was there, apparently, any evidence tending to prove that the inside room was selected by the plaintiff because

of its supposed immunity from fire. In other words, there was nothing in that case to show that the danger from fire was within the contemplation of the parties at the time the contract was made. (In the present case, if the contract was such as is claimed by appellee, then it is clear that appellee expressly contracted with reference to the danger from fire, and, therefore, the consequences resulting from a fire, with or without negligence on the part of appellant, were clearly within the contemplation of the parties at the time the contract was made. This fact, in our opinion, distinguishes the case of *McRae v. Hill*, supra, from the present case, and makes the decision in that case inapplicable in this case.

(Where a warehouseman expressly contracts to store goods and stores them instead in a building that is not of that character, in a fireproof warehouse, he is liable for loss by a fire resulting from whatever cause (40 Cyc. 422).) In *Wiley v. Locke*, 21 Kan. 143, it was said: "There was testimony tending to show an express agreement to store the goods in a brick building, and also that goods stored in that building were not injured by the fire which destroyed the adjoining wooden one. Assuming that there was such an agreement, it follows that the placing of the goods in a different building, which subjected them to a risk not contemplated by the parties, and wherein they were destroyed by fire, makes the appellants liable for the resulting loss. An agreement to keep property in a certain kind of a building is not satisfied by placing and keeping it in a different kind of a warehouse, especially one less secure than the kind of warehouse provided for in the agreement. * * * The appellee had a right to insist on the security and every advantage there is in a brick warehouse, and when the appellants stored the goods in another building, where they were burned, they made themselves liable for the value of the goods destroyed." That case cites in support of its conclusion the following cases: *McCurly v. Hallblom Furniture & Carpet Co.*, 74 Minn.

325; Hudson v. Columbian Transfer Co., 137 Mich. 473; Willey v. Doubleday, L.R. 7 Q.B.D. 510; St. Losky v. Davidson, 2 Cal. 643; Hatchett & Bro. v. Gibson, 13 Ala. 587; and Butler v. Greene, 49 Neb. 280; and all of these, upon examination, will be found to sustain the theory of liability above stated. In a note to the case of Wiley v. Locke, supra, as reported in 24 L.R.A. (New Series), 1117, the cases on this subject are collected, and the editor states that "the weight of authority sustains the conclusion reached in the above case, that where a warehouseman makes an express agreement to store goods in a certain building, the placing of the goods in a different building, which subjects them to a risk not contemplated by the parties, and wherein they are damaged or destroyed, makes the warehouseman liable for the resulting loss." It is true that not all of these cases dwell particularly upon the subject of proximate cause, but all of them either state or assume that where the contract for storage in a particular place (shows that a fire loss is within the contemplation of the parties,) such a loss is considered as a natural and proximate consequence of a breach of the contract by the warehouseman.)

It is next urged that a verdict for the defendant should have been directed because, it is said, the evidence shows that the warehouse was not operated by the defendant. The evidence of appellant is to that effect, but the evidence on behalf of appellee tends to prove that appellant advertised itself as operating a fireproof warehouse, with eight hundred steel-lined rooms; that this advertisement attracted the attention of appellee, and that the contract was made with appellant upon that understanding for the storage of his goods in one of such rooms. We think the preponderance of the evidence supports the theory of appellee in this respect.

it is also urged that appellant has no power under its charter to operate a warehouse. "The defense of ultra vires can be set up by a corporation only when it has been by it specially pleaded." (Chicago Pneumatic Tool Co. v. Council, 107 Ill. App. 244.) No such special plea was filed in this case, and there is nothing of that nature set up in the notice of defense under the plea of general issue that was filed by appellant.

It is urged that the second given instruction, which is directory in form, omits an essential element of the proof, viz: that of an alleged waiver of the stipulation for a fireproof room. The fact that appellee knew, a short time before the fire occurred, that his goods were not stored in a fireproof room, and failed to take them away, does not constitute a waiver, nor make a different contract. He testified that he called appellant's attention to the fact that the goods were not in the stipulated room, and was told they would be placed there. But even if this were not so, the failure of appellant to perform its contract did not require appellee to cancel or rescind the contract. He had the right to insist upon performance, and there is no evidence that he waived that right at any time. For the same reason, it was not error to refuse the two offered instructions upon the same point.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

237 - 20337.

JOHN K. JOICE,
Appellee,

vs.

LYDIA NORMAN,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

1921 A. 285

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Appellee, John K. Joice, sued appellant, Lydia Norman, for the value of services rendered in negotiating a sale of a sixty-acre tract of land belonging to appellant. Upon a trial before the court without a jury, appellee had judgment for \$11,850. The defendant appeals, and contends in this court that the evidence is insufficient to support the judgment either on the facts or the law of the case.

The evidence on behalf of appellee tends to prove that in May, 1913, appellant set a price of \$36,000 upon her property, (and agreed with appellee that if he sold it she would pay him a broker's commission of five per cent.: that he induced a Mrs. Lauer to make an offer of \$30,000 for the property, which was refused, and later an offer of \$35,000, which appellant agreed to accept; that thereupon the parties arranged to meet at the office of a trust company for the purpose of paying the earnest money and signing a formal contract; that this appointment was kept by appellee and Mrs. Lauer, but was not kept by appellant: that at least one other like appointment was made which appellant failed to keep, and that finally the parties met at the office of appellant's attorneys, where it developed that appellant's husband refused to sign the contract, and for that reason, her attorney advised her not to sign it. There was evidence tending to prove that Mrs. Lauer was ready, willing and able to buy appellant's property for \$35,000, and that, in fact, she actually executed, on her part, a formal contract to that effect. Appellant does not deny

that she authorized appellee to sell her property, nor that she agreed to accept the offer of Mrs. Leuer, but claims that it was understood from the beginning between her and appellee that no sale could be made unless her husband's consent could be obtained. She also claims that she never agreed to pay any specified amount or percentage to appellee as a commission for making a sale. Upon these questions of fact, the evidence is conflicting, and after due consideration of the case, we are unable to say that we think the finding of the trial court is manifestly against the weight of the evidence.

Appellant contends that in order to recover in this case, it was incumbent upon appellee to show that an enforceable contract for a sale had been actually executed by both parties. In support of this contention, the case of Wilson v. Mason, 180 Ill. 304, is cited. We do not understand that case to announce such a rule as ~~is~~ applicable to cases like the present one. It does hold that where a contract is, in fact, entered into, and the broker relies upon that fact to show that he has earned his commission, instead of attempting to prove that the purchaser produced by him was ready, willing and able to purchase upon the terms proposed by the seller, then the contract so relied on must be a valid and enforceable contract. But that is not this case. That the court did not intend in that case to announce that this rule has any proper application to such facts as were shown in this case is shown by the following language of the opinion: "The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commissions. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser was willing, ready and able to perform the contract according to the proposed terms."

In Max v. Ryan, 240 Ill. 391, a case of much the same character as that of Wilson v. Mason, supra, the court cites and quotes from the earlier case, but is careful also to add the following statement of the usual rule, applicable to cases like the present case: "Where a broker is employed to sell property by the owner, if he produces a purchaser within the time limited by his authority who is ready, willing and able to purchase the property upon the terms proposed by the seller he is entitled to his commissions, even though the seller refuses to perform the contract on his part. In such case, however, it is necessary for the broker to prove the readiness, willingness and ability of the purchaser to take the property on the terms proposed."

The proof in this case meets the requirements of the rule thus stated. To entitle appellee to recover in this case, it was not necessary for him to show that any contract was, in fact, signed by Mrs. Lauer. Having shown that he was employed as a broker by appellant, and that he found and produced a purchaser, it was only necessary for him to show further that such purchaser was ready, willing and able to buy the property upon the terms proposed. Whether the contract she did, in fact, sign was enforceable or not is immaterial under such circumstances, ^{for the reasons above stated,} as well as for the further reason that appellant did not object to the contract either in form or substance, but refused to sign any contract upon the sole ground that her husband would not sign with her.

Apart from what has been said above, there is another reason why the judgment cannot be reversed on account of any insufficiency of the evidence. This case was tried as a first class case in contract. After the trial a formal bill of exceptions was presented, signed and filed in the case. This bill of exceptions does not show that the finding and judgment of the court were objected to, nor that any exception was taken to the judgment. For

the reasons stated in the cases of Miller v. Anderson, (No. 10849, opinion filed October 8, 1914), and Photo Cines Co. v. American Film Mfg. Co., (No. 20057, opinion filed December 22, 1914), we have no authority to determine the questions of fact, nor to review the evidence, in the absence of an exception to the judgment.

Several minor points are made as to alleged errors in the admission or exclusion of evidence. We have given due consideration to these matters, and without discussing them seriatim, deem it sufficient to say that we think none of such alleged errors is of sufficient importance to require us to reverse the judgment.

The judgment of the Municipal court will be affirmed.

APPROVED.

20011
222 - 20310.

WILLIAM J. LEOP BREWING COMPANY,
a Corporation,

Defendant in Error,

vs.

ALLIANCE ASSURANCE COMPANY, LTD.,
a Corporation,

Plaintiff in Error.

WRIT OF

REMAND

OF CHICAGO.

192 I.A. 300

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

By this writ of error, it is sought to review the proceedings and judgment of the Municipal court in a fourth class case in contract. The plaintiff in that suit sought to recover from the defendant insurance company, the amount of a fire loss covered by an insurance policy issued by defendant. The defendant filed an affidavit of merits, stating in substance, that the insurance policy provided for an appraisal of the loss by disinterested appraisers, that such an appraisal had been made, and the loss appraised at \$227, which amount the defendant offered to pay, but denied liability in any further amount. To this the plaintiff filed an "affidavit of reply," alleging that the plaintiff was never notified of the selection of appraisers, nor of the time when appraisal would be made, was never given any opportunity of being heard, and that because of these facts, the appraisal was not binding on the plaintiff. A jury trial was had, resulting in a verdict in favor of the plaintiff for \$226. A judgment on the verdict was entered on May 23, 1914, and on the same day, an order was entered, extending the time "for filing stenographic report or statement of facts" to August 31, 1914. On August 7, 1914, an order was entered in the Municipal court, stating that by stipulation of the parties, the time for filing a stenographic report was extended until the 28th day of September, 1914, and on September 2, 1914, a stenographic report of the proceedings at the trial was filed.

A motion has been made to strike the stenographic report from the record, upon the ground that the order of August 7, 1914 was void, and that the Municipal court was without power to sign and place the stenographic report on file after August 31, 1914. Upon the authority of Lassars v. F. German Steamship Co., 344 Ill. 370, and Surlitzer Co. v. Dickinson, 367 Ill. 27, and for the reasons therein stated, the motion must be sustained.

It is urged by counsel for plaintiff in error that the rule announced in the cases above cited is unjust, unreasonable and oppressive. The same suggestion was made to the Supreme Court in the Surlitzer case above cited, and the court there said: "However that may be, such construction seems to be the only fair and reasonable one from the wording of the statute. If it results in injustice to litigants, any suggestions for a change must be addressed to the legislature and not to the courts."

It is also urged that the defendant in error is estopped from making this motion because the stenographic report is marked "C.R." by its counsel. This contention is also disposed of by the Surlitzer case, supra, where it was said: "The provisions of the statute on this point cannot be waived by stipulation."

It is also urged that defendant in error is further estopped by the fact that its counsel knowingly permitted the plaintiff in error to "go to considerable expense in having printed the abstract of record and the brief and argument." This suggestion is fully answered by what was said in Haines v. Danierine Co., 240 Ill. 259, viz: "The objection was of such a character as could be availed of at any time."

We have examined the assignment of errors attached to the record, and find none which can be considered by us in the absence of a stenographic report or statement of facts or bill of exceptions. It is suggested that the plaintiff's statement of claim, the affidavit of merits, and the "affidavit of reply," in themselves present a

question of law, without reference to anything contained in the stenographic report. If this were true, we could consider the question, if properly presented. But we find no question of law discussed in the briefs on file or among the errors assigned that does not depend upon the facts in the case. The statement of claim does not recite the terms of the insurance policy, and no question as to the validity or legal effect of the same can be determined without having it in the record. As there is no error in the record which this court can consider without a stenographic report or other equivalent document, the judgment of the Municipal court must be affirmed, and it will be so ordered.

STENOGRAPHIC REPORT STRICKEN
AND JUDGMENT AFFIRMED.

23 - 19404.

THE PIERCE PUBLISHING COMPANY,
a corporation,
Defendant in Error,

vs.

HARDEN &
HASSALGREN STUDIOS, a corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

192 I.A. 347

MR. JUSTICE PAM delivered the opinion of the court.

XXXXXXXXXXXXXXXXXXXXX This is an action brought in the Municipal court of Chicago by the Pierce Publishing Company, a corporation, defendant in error, hereinafter referred to as the plaintiff, for money alleged to be due from the Hassalgren Studios, a corporation, plaintiff in error and hereinafter referred to as the defendant, on account of advertisements published in plaintiff's magazine. Upon a trial of the case by the court without a jury, a judgment was rendered in favor of the plaintiff, to reverse which the defendant has sued out this writ of error.

The statement of claim alleged that there was due from defendant \$440.25 for advertising furnished at defendant's request, in the April and May, 1912, numbers of plaintiff's magazine.

The affidavit of merits denied that the advertising was published at defendant's request, and if published that it was without authorization and without the knowledge or consent of defendant.

The issue in this case involves but a single question of fact, namely, whether or not a contract existed between the parties. on this question there were^{originally} but two witnesses: Mr. Gerald Pierce on behalf of plaintiff, and W. W. Moulton on behalf of defendant.

It is admitted that the subject of advertising in plaintiff's magazine and the terms thereof had been discussed between them. The two witnesses, however, flatly contradicted each other as to whether or not defendant had actually authorized the insertion of the advertisements. Defendant's attorneys frankly admit that the testimony of Pierce, standing alone, was sufficient for

MR. JUSTICE R. H. JOHNSON and the opinion of the court.

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the court to enter a finding that a contract existed between plaintiff and defendant, but insist that the testimony of Boulton was directly to the contrary: that there were no other facts or circumstances in evidence to make the testimony of one appear more credible than that of the other: and that therefore the plaintiff failed to establish the only point in issue by a preponderance of the evidence. Moreover, defendant contends that the court, after plaintiff had finally rested its case, gave expression to a similar opinion.

While the record shows that the court was impressed with defendant's contention, it further shows the fact that the court, of its own motion, and over the objection of defendant, continued the case, to give plaintiff an opportunity to call as witnesses certain persons whose names had been mentioned during the course of the trial. On further hearing, after the additional testimony was taken, the court found the issues for the plaintiff and entered judgment for \$440.25.

Defendant complains that the action of the court in reopening the case after it had been closed, constituted error: and moreover, that the testimony of the witnesses - especially that of Mr. Gansbergen - was not of a character to warrant the court in arriving at the conclusion that plaintiff had sustained the issues by a preponderance of evidence.

The continuance of the case so as to give the parties an opportunity for presenting additional evidence was clearly within the sound discretion of the court; and unless such action indicated a clear abuse of that discretion, it cannot be complained of here. In our opinion, there was not such an abuse of discretion.

Defendant also maintains that the court should not have relied on the testimony of Gansbergen because he was a member of the firm of attorneys representing plaintiff, although he took no part in the trial of the case. The court, however, did not approve

of such criticism, and stated further that he himself was responsible for having Ganeberger testify.

After hearing the additional testimony, the court was evidently of the opinion that plaintiff had sustained the issues by a preponderance of the evidence. He cannot say that such finding was clearly and manifestly against the weight of the evidence, and the judgment must therefore be affirmed.

REVEREND.

EDWARD HODDER,
Defendant in Error,

vs.

MORRIS ST. P. THOMAS, impleaded
with Morris St. P. Thomas, as
Trustee under the will of Lyman
Trumbull, deceased,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

192 I.A. 348

STATEMENT OF THE CASE. This is an action in tort brought by Edward Hodder, defendant in error, hereinafter referred to as plaintiff, in the Municipal Court of Chicago, alleging damages in the sum of \$1,000, for personal injuries, against Morris St. P. Thomas, plaintiff in error, hereinafter referred to as defendant, who was sued both as an individual and as trustee under the will of Lyman Trumbull, deceased.

Plaintiff's statement of claim alleged that he sustained injuries on or about July 26, 1918, by reason of the breaking of the steps in the rear stairway of the Glenwood apartment building, located at 1741 Washington boulevard, Chicago, which building was under the supervision of the defendant who was then and there lessor of certain apartments with passageways and stairways which were used in common by various tenants of said building; that defendant neglected to keep same in good and reasonable repair, because of which, plaintiff, in leaving one of the apartments of said building on the top floor thereof where plaintiff was residing, and while walking along and over one of said passageways, landings or stairways for the purpose of egress from said building to the said alley or court: and using all due care and caution for his own safety, one of the boards of said stairway collapsed, whereby plaintiff tripped, stumbled and fell by reason of the negligence of defendant; that the condition of the passageways, landings or stairways was known to or discoverable by the defendant in the exercise of reasonable care, because of which plaintiff was injured

and sustained damages to the extent of the sum alleged, namely, 1000.

Defendant in his affidavit of merits set forth that:

- (1) That defendant individually has and had no ownership or control of said premises;
- (2) That defendant did not neglect to keep said passages, landings and stairways in good and reasonable repair;
- (3) That plaintiff did not exercise due care and caution for his own safety;
- (4) That plaintiff did not sustain any material injury;
- (5) That the alleged defect was not known to the defendant either individually or as trustee and could not have been discovered by him in the exercise of reasonable care.)

On these issues the case proceeded to trial before a court and jury. At the close of plaintiff's evidence, defendant as trustee, and individually, moved the court for a peremptory instruction to find said defendant not guilty. The court sustained the motion in behalf of defendant as trustee, and instructed the jury to find defendant as trustee not guilty, but overruled the motion to find the defendant not guilty as an individual. At the close of all the evidence this motion for a peremptory instruction to find defendant not guilty individually was renewed, but again overruled by the court, and the cause submitted to the jury, who returned the following verdict:

"No, the jury, find defendant guilty in the manner and form charged in plaintiff's statement of claim, and assess plaintiff's damages in the sum of \$1,000 in tort."

Defendant moved for a new trial and in arrest of judgment, both of which motions were overruled; and on November 1st the court entered judgment in the following form:

"This cause coming on for further proceedings herein it is considered by the court that the plaintiff have judgment on the verdict herein and that the plaintiff have and recover of and from the defendant the damages of the plaintiff amounting to the sum of One Thousand Dollars (\$1000.00) in

for" as aforesaid assessed together with the costs by the plaintiff herein expended and that execution issue therefor."

This judgment was rendered in the case entitled "Edward Sisson vs. Morris H. St. P. Thomas individually and as trustee under the last will of Lyman Trumbull deceased."

A writ of error was sued out to reverse said judgment on November 13, 1913, and on February 4, 1914, a bill of exceptions was filed nunc pro tunc as of December 1, 1913. On February 21, 1914, the following order was entered.

"And now on this day again come the said parties by their said attorneys and the attorney for the defendant Morris St. P. Thomas, as trustee under the last will and testament of Lyman Trumbull, deceased, moves the court to vacate the judgment rendered herein on the first day of November, 1913, as to the said Thomas as such trustee, and ~~it is ordered~~ to the court from an inspection of the record and the bill of exceptions or stenographic report, heretofore filed herein, that the clerk of this court committed error in recording the judgment intended to be rendered by the court in this case and that it was in fact the purpose and intention of the court to render judgment against the defendant Morris St. P. Thomas in his individual capacity only and not against him in his capacity as trustee, as aforesaid, it is now ordered, the plaintiff's said attorney being now present in open court and not objecting but expressly consenting thereto, that the said judgment be and it is hereby vacated and set aside, nunc pro tunc as of the first day of November, 1913, as to the defendant Morris St. P. Thomas, as trustee under the last will and testament of Lyman Trumbull, deceased, and that the record of said judgment be and it is hereby amended, nunc pro tunc as of the first day of November, 1913, so that the third paragraph of the record of said judgment shall read as follows:

"This cause coming on for further proceedings herein it is considered by the court that the plaintiff have judgment on the verdict herein and that the plaintiff have and recover from the defendant in his individual capacity the damages of the plaintiff amounting to the sum of One Thousand (\$1,000.00) in form as aforesaid assessed together with the costs by the plaintiff herein expended and that execution issue therefor."

The foregoing order is an amendment of the judgment entered November 1, 1913, to reverse which this writ of error has been sued out

MR. JUSTICE SAN delivered the opinion of the court.

The points relied upon by defendant for a reversal are as follows:

(1) That the verdict rendered is void for uncertainty and therefore the judgment entered on such verdict must be reversed and the cause remanded to the trial court:

(2) That a landlord can only be charged with negligence in failing to keep common passageways and stairways in repair after notice of the existence of the dangerous condition or after the defect has continued such a length of time as to charge him with constructive notice. The plaintiff failed to prove the existence of a visible or patent defect or notice to the landlord of any existing defect.

(3) It was error for the court to refuse to strike from the record the will of Lyman Trumbull, deceased.

We shall discuss these ad seriatim.

In arguing the first contention, defendant maintains that this suit was brought against defendant both as trustee and as an individual; that it was a suit against two distinct and separate persons; that at the time the verdict was returned by the jury the suit was still against two distinct and separate persons; that the verdict finding the defendant guilty leaves it uncertain whether or not it was the intention of the jury to find the defendant guilty both as an individual and as trustee, or in either capacity. Defendant insists that this is true, even though the court at the conclusion of plaintiff's case instructed the jury to find the defendant as trustee not guilty, because, there having been no order of dismissal entered and the record showing no verdict returned finding defendant as trustee not guilty, there is nothing in the record to show but what the jury might as well have meant that they were finding against the defendant as trustee as against him individually;

that this uncertainty in the verdict made it void, and therefore it could not support the judgment entered thereon.

The record in this case shows that upon motion of the defendant the court instructed the jury to find the defendant as trustee not guilty. It further shows that in moving to strike out the last will of Lyman Trumbull, deceased, defendant based his motion on the ground "that the case has already been dismissed as to Morris St. P. Thomas as trustee, and therefore the document is incompetent, irrelevant and immaterial." Moreover, the court in giving instructions to the jury, began them as follows:

"Gentlemen of the Jury: It has been suggested that the Court has dismissed as regards Mr. Thomas as trustee. This is no intimation on the part of the Court as to the liability or non-liability of Mr. Thomas as an individual."

This instruction is usually given where one or more of the defendants have been dismissed out of the case and the suit as to them has been terminated. This instruction, in our opinion, shows that the trial court was of the opinion that the suit as to Thomas, trustee, had been dismissed. The proceeding to amend the judgment, and the order of February 21st, heretofore set out in full, amending the same, also show that defendant's counsel and the court were of this opinion. We are of the opinion that the defendant is not in any position to assert in this court, that there is any uncertainty in the verdict, but because of his conduct, the verdict must be regarded as one against him individually.

The next point raised by defendant is that the plaintiff failed to prove the existence of a visible or patent defect, or notice to the landlord, of any existing defects in the common passageways and stairways.

The rule of law is well established, that where a landlord leases separate portions of the same building to different tenants,

The law is also well settled that the landlord can be charged with negligence in failing to keep the common passage and stairways in repair, only after notice of the existence of the dangerous condition, or after the defect has continued for such a length of time as to charge him with constructive notice. Burke v. Bullett, 218 Ill. 545.

These principles of law were all included in the oral instruction given by the court, and it is in the light of these principles of law that we must view the facts in the case.

Plaintiff was a roomer in the apartment of one Chapasky who was a tenant of the defendant, occupying the fourth floor of the premises in question. Chapasky became a tenant during 1911. On the day of the accident, the plaintiff, on his way to work, left by the rear entrance of the premises, and as he descended upon the second step it gave way and he fell through, whereby he sustained the injuries for which this action was brought.

Plaintiff's witnesses, besides himself, were Chapsky and his wife, and Mias Walker, another tenant in the building. All testified that the step through which plaintiff fell was decayed and rotten, and that the edges of other boards to which it was nailed were also rotten and decayed.

Defendant's witnesses were Mr. Pace, the agent in immediate charge, Gustav Wahlman, the carpenter who occasionally made repairs, and one Davis, the janitor. While these witnesses testified to the contrary, yet defendant admits that the issue presented by this conflict in the evidence was a question for the jury. xxxxtbat

The defendant, however, strongly addresses himself to the contention that this decayed and rotten condition of the wood and the supports, was not patent; that defendant had no notice thereof, and that there were no circumstances or facts in evidence from which it appeared that the landlord could by the exercise of reasonable diligence, have discovered such defect or could be charged with constructive notice thereof.

It is conceded that actual notice of a defective condition is not essential in order that liability may attach to the defendant. If there are facts and circumstances in evidence from which the jury may reasonably infer that the defendant in the exercise of reasonable diligence could have discovered the defective condition, then the defendant may be charged with constructive notice thereof.

The evidence of the plaintiff showed that the steps and porches had been in use for at least 18 years; that the condition of the porches and steps was such that after a rain, water would remain on the steps and porches to the depth of one or two inches; that in winter snow and ice gathered and remained there for a long period of time; that in February, 1912, there was an overflow in the tank on the roof, and water running down froze and left the porches and stairs covered with ice; that this circumstance, as well as the fact that water would gather upon the porches and steps, was called to the attention of defendant's agents by Chapansky; that in the fall of 1911 and thereafter, the stairway and especially the boards at the top of the stairs, were very shaky and looked old and worn; that some of the boards on the porch leading to the stairs in question were "loose and soft," and that people using the porch would sometimes catch their heels in these loose boards; and that the condition of these boards was called to the attention of the janitor several months prior to the accident.

Defendant's witnesses stated that there was nothing in the appearance of the steps or boards that indicated any defect therein. Moreover, the carpenter testified that two or three weeks before the accident he had gone over the steps in preparation for having them painted, and that the steps were in good condition. Two witnesses for the plaintiff said they never saw any repairs made there, and that if they had been made before the accident they could have seen or heard them made.

Under these facts and circumstances, the court could not say as a matter of law that the plaintiff failed to show that the landlord knew of the defects, or by the exercise of reasonable care, should have known of them; and therefore it properly denied the motion of defendant to instruct the jury to find the defendant as an individual not guilty, both at the close of plaintiff's case and at the close of all the evidence. Libby, McNeill & Libby v. Cook, 228 Ill. 431.

Being of the opinion that the question of notice was properly submitted to the jury, the verdict must be final thereon, unless it is palpably against the weight of the evidence. We are, however, of the opinion that the jury were fully warranted in arriving at the conclusion that under the facts and circumstances in evidence in this case, defendant was chargeable with notice of the defecting condition of the porch and stairs. In this view we are sustained by the cases of Wohlrich v. Krolch, 143 Ill. App. 437, and Seiklik v. Grajman, 147 Ill. App. 280.

In Rouillon v. Wilson, 51 N. Y. Sup. 430, the following principle of law is announced:

"Where, as here, there is notice of a defect in a part of an apartment, arising from a cause which would operate to impair the whole apartment, it is sufficient to impose upon the owner the duty of inspection of the whole apartment."

The facts in the case at bar support the application of the same principle of law. The case of Murke v. Hulett, supra, cited by

defendant, is not inconsistent with the foregoing authorities, nor with the views herein expressed.

Defendant also complains that the court erred in refusing to strike from the record the will of Lyman Trumbull, deceased: he bases his contention upon the ground that the court having already instructed the jury to find defendant as trustee not guilty, the will was immaterial and incompetent, as it did not contain any direct reference to the premises in question: and further, that the will being of considerable length, gave the appearance of referring to a large estate and thereby it might have had some weight with the jury in determining the amount of the damages to be assessed, to the prejudice of the defendant. We think this contention is without merit. It was conceded that this property was part of the Trumbull estate: the will was proper evidence to show that the defendant had control of this property, it being part of the estate. It is admitted that defendant might be liable as an individual even though his authority came to him as trustee.

Finding no reversible error, the judgment of the Municipal court will be affirmed.

affirmed.

plaintiff also testified that the rear of the car was
7, and that she made note of it the night of the accident.

In defense, it was admitted by several defendants
a... it called, would testify that there was one car
number 137, in possession of the defendant at the time
of the accident; and it was further admitted that the driver of the
car was the person who caused the accident.
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At the time of the accident, the car was in possession of the defendant, and
the defendant was the person who caused the accident.

drawn therefrom, fairly tended to show that the defendant's negligence was the proximate cause of the plaintiff's injuries.

Plaintiff testified that when she was taken from the hospital to the home of her mother, she was in a very weak condition and was unable to walk. She was taken to the home of her mother, where she remained for a period of time. She testified that she was in the hospital for a period of time, and that she was taken to the home of her mother, where she remained for a period of time. She testified that she was in the hospital for a period of time, and that she was taken to the home of her mother, where she remained for a period of time.

Plaintiff testified that she was only a superficial injury, and that she only sustained a slight bruise on the side of her head. She testified that she was only a superficial injury, and that she only sustained a slight bruise on the side of her head. She testified that she was only a superficial injury, and that she only sustained a slight bruise on the side of her head.

Plaintiff testified that she was not injured, and that she was only a superficial injury. She testified that she was not injured, and that she was only a superficial injury. She testified that she was not injured, and that she was only a superficial injury. She testified that she was not injured, and that she was only a superficial injury. She testified that she was not injured, and that she was only a superficial injury.

She was suffering from intestinal indigestion at the time of the accident, and for such trouble at frequent intervals about the time of the accident.

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WISCONSIN SOLDERING & CUTTING
CO., a Corporation,

Defendant in Error,

vs.

BERLIN MACHINE WORKS, a Cor-
poration,

Plaintiff in Error.

ERRON TO

MUNICIPAL COURT

OF CHICAGO.

1921.A. 360

MR. JUSTICE PIERCE delivered the opinion of the court.

This is a fourth class contract case wherein the Wisconsin Soldering & Cutting Company, defendant in error, plaintiff below, brought suit against the Berlin Machine Works, plaintiff in error, defendant below, for the sum of \$60, for merchandise sold and delivered, and labor performed by said plaintiff for said defendant.

A proper statement of claim was filed wherein was set forth in detail the character of the claim. Defendant filed an affidavit of merits putting directly in issue the claim of the plaintiff. Upon the trial of the case before the court without a jury, the court found the issues against the defendant and assessed plaintiff's damages in the sum of \$22, upon which finding judgment was entered November 9, 1914, to reverse which this writ of error was sued out; and on the same day an order was entered allowing the defendant sixty days in which to file a bill of exceptions. On January 8, 1915 - the last day in which to file a bill of exceptions - an order was entered stating that by stipulation of the parties, the time for filing and signing the bill of exceptions be extended ten days. The bill of exceptions, which in fact was a stenographic report or statement of facts, was marked "presented January 16, 1915," and this instrument was filed February 10 nunc pro tunc as of January 12.

A motion has been made to strike the stenographic report filed herein from the record, upon the ground that the order of January 8, 1915, was void and the municipal court was without jurisdic-

diction to sign and have placed of record the stenographic report after January 8, 1915. In support of said motion, plaintiff cites the cases of Laniera v. North Western Lloyd W.B. Co., 314 Ill. 570; Wilson v. Johnson, 170 Ill. App. 383; Furlitzer v. Dickinson, 347 Ill. 27. No counter-suggestions to this motion were filed by defendant.

In view of the record in this case the foregoing authorities are controlling. Even though a stipulation was entered into January 8, 1915, extending the time ten days, the record shows that the said stipulation and the order extending the time for filing the stenographic report was not entered within thirty days after rendition of the judgment, the period in which such extension must be made, in cases of the fourth class, under the provisions of the statute.

In the case of Furlitzer v. Dickinson, supra, it was held that "the provisions of the statute on this point cannot be waived by stipulation." The motion of the plaintiff to strike the stenographic report from the files must be granted.

As all assignments of error are based on such stenographic report, there is nothing left for this court to pass upon in the further prosecution of this writ of error; the judgment must therefore be affirmed, and it will be so ordered.

STENOGRAPHIC REPORT STRICKEN
AND JUDGMENT AFFIRMED.

HERBERT L. LEMON,
Appellee,
vs.
ARTHUR H. LEMON et al.,
Appellants.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

1921 A. 361

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

The appellee in this cause, Herbert L. Lemon, brought a bill in equity in the Circuit Court of Cook County against the appellants, Arthur H. Lemon and Ida Matilda Lemon, his wife, and Warren A. Baker and Addie L. Baker, his wife, and made also parties defendant thereto the Monarch Metal Company, a corporation, and Jennie Lemon, the wife of the complainant. By this bill, upon allegations therein made, the complainant prayed that the Court might decree that he, the complainant, was the owner of and entitled to thirteen shares of the Monarch Metal Company; that Arthur H. Lemon was the owner of and entitled to five shares in said Company; and that Warren A. Baker was the owner of and entitled to seven shares in the capital stock of said Company; and that it might order Warren A. Baker as Secretary of said Company to execute and seal with the corporate seal certificates of stock also executed by the complainant as President of said Company in the proportion before mentioned, and deliver the said certificates to the respective owners thereof. He also prayed that Arthur H. Lemon and Warren A. Baker and their wives, and he, the complainant, and his wife, should be required to execute and deliver unto the corporation, the Monarch Metal Company, a good and sufficient conveyance or deed of Lot 14 in Block 7 in Ashland Second Addition to

Chicago.

The Monarch Metal Company filed an answer to said bill, in which it alleged that the matters and things contained in the bill were in respect to a controversy among the stockholders of the corporation as to their respective interests and shareholdings in the Company, and that the Company would abide by the decision of the Court in respect to these matters and things.

Arthur H. Lemon and Warren A. Baker and their wives after filing a general demurrer abandoned the same and filed a joint and several answer, in which they made many extended and detailed allegations contradicting or further elaborating the allegations of the bill on which the prayers before recited were based, and asserting that of the capital stock of the Monarch Metal Company, which is in all 25 shares, Herbert Lemon was not entitled to thirteen shares, but to ten only, and that Arthur H. Lemon and Warren A. Baker was each entitled to seven and a half shares; and that the title to said real estate mentioned (which was used by said Company for its business) was, in accordance with an agreement of the complainant and the defendants, although purchased out of the profits of the corporation, vested in equal undivided third parts in Herbert L. Lemon, Arthur H. Lemon and Warren A. Baker, and ought so to remain. Wherefore, claiming the same benefit as though they had demurred, the said defendants asked the dismissal of the bill.

The cause was referred to a Master in Chancery to take evidence and report conclusions. A great amount of evidence was taken, on consideration of which the Master found:

That Herbert L. Lemon invented and procured a

patent for a certain "Babbitt Metal Ingot" in 1897; that he began to manufacture such ingots under the name of the Monarch Metal Company that same year; that his sister's husband, Warren A. Baker, shortly after invested \$600 in the business, and that there appeared "to have been some sort of understanding that Baker and Herbert L. Lemon would have in said business, when it got on its feet, substantially equal interests," but that it was also understood "that the said Herbert L. Lemon should retain the controlling interest in said business and that at any time when (as was contemplated) a corporation was organized to take over the business, said Herbert L. Lemon should have the controlling interest in said corporation; that in 1899 Arthur H. Lemon became a traveling salesman for the business, receiving \$12 a week and his expenses on the road; that in 1900 Herbert L. Lemon (who as well as Warren A. Baker had been theretofore also otherwise employed, but had given their spare time to the business) gave up his other business, and, as well as Arthur H. Lemon, went on the road to sell the product of the Monarch Metal Company, receiving \$15 a week and his expenses; that also in 1900 Herbert L. Lemon and Warren A. Baker and Arthur H. Lemon after some discussion agreed that thereafter Herbert L. Lemon should draw forty per cent. of the profits and said Baker and Arthur H. Lemon should each draw thirty per cent. of the profits; but that while the profits of the business should be so divided even in the event of an incorporation, the said Herbert L. Lemon was to retain the control of the business, and in the event of an incorporation Arthur H. Lemon should receive only twenty per cent. of the stock and the remainder should be divided between Baker and Herbert L. Lemon in such manner that Herbert L. Lemon should have a sufficient amount of stock to give him the control of

the business; that Baker thereafter expressed his dissatisfaction with this arrangement and Herbert L. Lemon agreed that he would divide his extra ten per cent. of the profits with said Baker, thus giving to each thirty-five per cent. of the profits; that Arthur H. Lemon was not informed nor knew of the existence of this last undertaking until after this suit was commenced; that after this arrangement the business was carried on in the same way until February, 1905, when steps were taken to incorporate; that at various times Herbert L. Lemon has contributed sums to the business aggregating \$1133.86, which have not been repaid; that Mrs. Warren A. Baker at different times has contributed various sums to the business aggregating \$600. which, however, have been repaid to her; that neither Warren A. Baker nor Arthur H. Lemon ever contributed anything to the business; that after the arrangements above described and up to the time of the incorporation profits were credited up on the books of the business in the proportions of 40 per cent. to Herbert L. Lemon, 30 per cent. to Arthur H. Lemon and 30 per cent. to Warren A. Baker, and that from time to time adjustments were made outside of said books, whereby the extra 10 per cent. received by or credited to Herbert L. Lemon was divided with Baker; that although no further conversations or arrangements were had or made with reference to the interests of said parties, it was recognized by them all that Herbert L. Lemon had the right to control the general policies and affairs of the Company; that in February, 1905, Arthur H. Lemon was authorized to employ lawyers to take the steps necessary to incorporate the Monarch Metal Company with a capital stock of \$2500 divided into 25 shares of \$100 each; that in accordance with said arrangement an application was

filed with the Secretary of State, and Herbert L. Lemon, E. W. Winkler and Arthur H. Lemon were authorized as Commissioners to open books of subscription for the capital stock of said corporation; that thereafter the Commissioners filed a report in the office of the Secretary of State in which it was recited that Herbert L. Lemon had subscribed for thirteen shares, Warren A. Baker for seven shares, and Arthur H. Lemon for five shares; that the Commissioners' Report contained what purported to be a copy of the original subscriptions for stock, with the actual individual signatures of the parties attached to said copy.

The Master says in his Report:

"The evidence is exceedingly contradictory and unsatisfactory as to whether the figures indicating the amount of stock belonging to each party were on said document at the time when their signatures were attached thereto, but I am of the opinion that they were there at that time. At any rate, those figures are in accordance with the understanding of the parties as to what their respective stock holdings were to be."

It may be noted (although the Master does not incorporate it in his findings) that the evidence shows that the minutes of a supposed first meeting of stockholders show a recital of these subscriptions and are signed by "Warren A. Baker, Secretary of the meeting."

The Master further finds that in June, 1905, Herbert L. Lemon executed and delivered an assignment to the said corporation of his letters patent, but that no formal assignment of any other property or assets of the partnership was ever made to it; that for some time prior to May 26, 1909, the business of the Monarch Metal Company was conducted upon rented premises known as Lot 14 in Block 7, in Ashland Second Addition to Chicago; that the three parties interested in the corporation determining that it would be advisable to purchase these premises, authorized Arthur H. Lemon to negotiate for their purchase; that

he did so and took the title in his own name, making a cash payment with money belonging to the corporation and giving his own notes for the unpaid portion of the purchase price, some of which notes have been since paid with the money of the corporation; that repairs and taxes have been paid since with the funds of said corporation and the place used by the said corporation for its business; that in July, 1909, Arthur H. Lemon and wife conveyed to Herbert L. Lemon and Warren A. Baker an undivided one-third interest in said premises.

The Master also finds that a short time after the Company was incorporated some dissatisfaction was manifested by Baker and Arthur H. Lemon, and some attempt made to get Herbert L. Lemon to sign and deliver stock in the proportion of ten shares to Herbert L. Lemon, seven and a half shares to Warren A. Baker and seven and a half shares to Arthur H. Lemon, but that such attempt was unsuccessful and no stock certificates were ever in fact executed by the officers of said Company and delivered to the respective parties in interest; that no positive steps were taken to change the existing conditions until a short time prior to the commencement of this suit, when a disagreement on a matter of business policy occurred; that thereupon Herbert L. Lemon asserted that he had the right to dictate the business policy, having, as he maintained, the controlling interest in the Company; that upon this being disputed, three stock certificates were by his instructions prepared, setting out the ownership of said stock as follows: Herbert L. Lemon 13 shares; Warren A. Baker 7 shares; and Arthur H. Lemon 5 shares; which certificates were executed by Herbert L. Lemon as President, and presented by him to Baker with the request that he execute them as Secretary; that this demand was refused.

On these findings the Master stated his opinion to be that -

"It was the intention of the parties that the said Herbert L. Lemon should have the controlling stock ownership, but that the said three parties should nevertheless be interested in the profits of the Company in the same proportions as hereinbefore found."

Many objections were filed to the Master's report which were afterwards ordered to stand as exceptions to the same before the Chancellor, but on hearing they were all overruled and findings repeating substantially those of the Master were incorporated in a decree entered by the Chancellor in the Circuit Court May 24, 1913, from which this appeal was taken.

The ordering part of the decree approves the Master's report and adjudges Herbert L. Lemon to be the owner of thirteen shares of the Monarch Metal Company, Warren A. Baker to be the owner of seven shares, and Arthur H. Lemon to be the owner of five shares; and that each of said three parties is entitled to the number of shares stated. The decree then proceeds:

"It is further ordered, adjudged and decreed that the complainant Herbert L. Lemon as President and the defendant Warren A. Baker as Secretary, execute in their respective capacities stock certificates of said Monarch Metal Company, a corporation, Thirteen shares thereof to Herbert L. Lemon, seven shares thereof to Warren A. Baker, five shares thereof to Arthur H. Lemon, and that the said Warren A. Baker as Secretary of said corporation impress the seal of said corporation on said certificates of stock so executed, and that delivery thereof be made to the respective owners thereof and parties entitled thereto, as hereinabove set forth, within ten days from the date of the entering of this decree.

It is further ordered, adjudged and decreed that the net profits of said Monarch Metal Company, a corporation, be divided and paid to complainant Herbert L. Lemon, the defendant Warren A. Baker and the defendant Arthur H. Lemon, or to their respective assignees or transferees, of their respective stock interests in said corporation aforesaid, in the following proportions:

To Herbert L. Lemon, his assignee or assignees, transferee or transferees, thirty-five per cent. thereof; to Warren A. Baker, his assignee or assignees, transferee or transferees, thirty-five per cent. thereof; to Arthur H. Lemon, his assignee or assignees, transferee or transferees, thirty per cent. thereof.

It is further ordered, adjudged and decreed that

within ten days from the date of entering of this decree the complainant Herbert L. Lemon and Jennie Lemon, his wife, the defendant Warren A. Baker and Addie Baker, his wife, and the defendant Arthur H. Lemon and Ida Latilda Lemon, his wife, execute, acknowledge and deliver a quit-claim deed conveying unto Monarch Metal Company, a corporation, the following described property, to-wit: Lot Fourteen in Block Seven in Ashland Second Addition to Chicago, * * * and that upon the delivery of such conveyance Herbert L. Lemon pay to the defendant Warren A. Baker the sum of Two Hundred Forty-seven Dollars and Fifteen Cents (\$247.15) and to the defendant Arthur H. Lemon the sum of Two Hundred and Eleven Dollars and Eighty-five Cents (\$211.85), the aggregate of which said two sums, namely, Four Hundred Fifty-nine Dollars (\$459) being seventeen per cent. of the difference between the proportion of the stock interest of Herbert L. Lemon, complainant, in said corporation aforesaid, namely, fifty-two per cent. and his profit sharing interest therein, namely, thirty-five per cent of the sum of Twenty-seven Hundred Dollars, made up of Twenty-five Hundred Dollars, the principal of the amount of the purchase price of said premises already paid out of the funds of said corporation, and two hundred dollars, the approximate sum paid on account of repairs of said premises out of the funds of said corporation."

It is maintained by the appellants herein that even if the findings or conclusions of fact of the Master were justified by the evidence, which it is insisted they are not, yet the decree is erroneous because equity has no jurisdiction of the matters involved.

It is insisted that as the Courts of Illinois - differing therein from those of some other States - hold mandamus to be a proper remedy to compel a private corporation to allow on its books a registry of a transfer of its stock, the power of equity by a decree to compel the officers of such a corporation to issue certificates of stock is not necessary; that an adequate remedy at law exists. But the very opinion cited in support of this contention - *Smith v. Automatic Photographic Company*, 118 Ill. App. 649 - says that "It may be that a court of equity could compel the respondent to perform this duty * * * but it is no longer an objection to the granting of a mandamus in this State that the relator may have another specific remedy."

Moreover, there are in this case especial reasons that can properly be alleged why the jurisdiction of equity should not be held excluded.

The contest is really and in essence between stockholders as stockholders, not between a stockholder and officers as officers, or as representing the corporation. It is in effect, so far as the stock is concerned, a suit for a specific performance of a contract to distribute stock in certain proportions. The appellants say that by the authorities "a peculiar value" must attach to the stock sought to make it proper to invoke the aid of equity in such a case. This may be conceded. But we think this requisite "peculiar value" to the complainant is plainly shown here by the character of the stock and business and the contest over the business control of the Company.

Again, the fact that the title to real estate is involved in the general settlement of the affairs between the stockholders and the Company, gives an additional reason for holding a suit on the chancery side of the court a proper method of seeking the remedy desired.

We do not agree with the counsel for appellants in holding the bill so multifarious as to require the reversal of the decree. Although it is true perhaps that a chancellor may give the advantage of a demurrer on this ground to one who has abandoned a demurrer and taken such testimony on the merits, it certainly is largely within his discretion, of which it is no abuse if he is slow to take this course. *Gilmore v. Sapp*, 100 Ill., 297. In the present case we should have deemed it improper to have refused a decree disposing of the whole matter litigated.

The corporation was before the Court as were its three stockholders. As a corporation it agreed to abide by the decision of the Court. The cause presented a fit opportunity for settling the various alleged rights in contention.

It is urged that the complainant was guilty of laches which should defeat his right to a decree. But independently of all questions of pleading connected with this defence, this contention rests, so far as the stock is concerned, as counsel for the appellee points out, on the belief that the Master was in error in holding more credible and accurate the evidence offered by the appellee than that presented by the appellants. If the Master was not thus in error, the argument fails, as we think.

On the position, however, that the Master was thus in error the appellants place great emphasis. They insist that his conclusions on the facts followed by the Chancellor in his decree were clearly against the weight of the evidence. It would be of no service to any one for us to discuss this in detail, as the counsel for the respective parties have done. It is sufficient to say that we have considered all the evidence, and while we find it in parts, as the Master did, "contradictory and unsatisfactory," yet independently of the amount of prima facie weight that should be given his findings, those findings coincide with our own conclusions. It is not merely the number of witnesses testifying directly on a given point one way or the other that must be considered in a case like this. Probabilities must be weighed and legitimate inferences may be drawn from them and from surrounding circumstances.

There is, however, one suggestion concerning the decree made by the appellants which seems to us to have much

weight. They complain with some justice that -

"If this decree were to be affirmed and carried out, appellee would, in the course of events, come into possession of thirteen shares of stock without restriction as to their earning power and transferable upon the books of the corporation. Transfer of the shares by appellee to an innocent party without notice would create a situation seriously jeopardizing the rights and interests of appellants."

To this the appellee replies in effect that there can be no "innocent parties without notice", inasmuch as the decree, which is notice to all the world, provides how the net profits of the corporation shall be divided notwithstanding the stock holdings. The question whether this is a sufficient answer may be waived, for by slight modification the objection to the decree can be entirely obviated. This modification we have, and shall exercise, the power to make.

In the decree, in that portion which is hereinbefore recited, between the words "and that delivery thereof be made to the respective owners thereof and parties entitled thereto, as hereinabove set forth, within ten days from the date of the entering of this decree", and the words, "It is further ordered, adjudged and decreed that the net profits of said Monarch Metal Company, a corporation, be divided and paid to complainant", etc., is hereby inserted these words:

"Upon the face of said stock certificates shall appear the words: 'The participation in dividends or profits of the Company of the present or future holders of the shares represented by these certificates is limited by the decree of the Circuit Court of Cook County entered May 24, 1918, in the cause of Herbert L. Leason vs. Arthur L. Leason et al., and by reference said decree is made a part of this certificate.'"

As thus modified the decree is affirmed.

DECREE MODIFIED AND AFFIRMED.

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123 - 20044

MATTHEW SULLIVAN,
Defendant in Error,

vs.

HARRY WOLF doing business as
CLIMAX ELECTRIC CARPET CLEANING
WORKS,
Plaintiff in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

192 I.A. 365

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

It is plain that the judgment of \$70 rendered by the Municipal Court against the plaintiff in error, Harry Wolf, in favor of the defendant in error, Matthew Sullivan, must be reversed and the cause remanded to that Court. This is not on the question of service, which the plaintiff in error is not, as we think, in a position to raise. He has submitted himself to the jurisdiction of the Court. But the Court was plainly wrong in assessing the damages (the action being one in tort) merely on the statement and affidavit of claim of the plaintiff.

Evidence was necessary to establish the damages. Neither the Practice Act nor the Municipal Court Act justifies or purports to justify the entry of a judgment on such a statement and affidavit as had been filed here.

The "Statement of Claim" says that the plaintiff's claim is for \$70 damages, growing out of the defendant's ruining three valuable rugs in an attempt to clean them. The affidavit only alleges that the affiant is the plaintiff in a suit "for damages as set forth in the aforesaid statement of claim, and that he claims damages amounting to seventy dollars and therefore he brings this suit."

It will be noticed that the plaintiff does not even swear that he has been damaged to the extent of seventy

dollars, but merely that he claims damages to that amount. This is tantamount only to naming an ad damnum in an action of tort.

The judgment is reversed and the cause remanded. The cause should be tried de novo, allowing the defendant to make such defence as he may be advised and is able to.

REVERSED AND REMANDED.

FRED D. DAVIS,
Appellee,

vs.

THE STEVENS-DAVIS COMPANY,
Appellant.

APPEAL FROM THE MUNICIPAL COURT
OF CHICAGO.

1921 A. 374

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

A judgment for \$921.17 was rendered by the Municipal Court of Chicago in a first class case January 21, 1914, in favor of Fred D. Davis against The Stevens-Davis Company, a corporation. The Stevens-Davis Company has appealed from this judgment to this Court. The cause was tried before the Court without a jury.

The defendant is an advertising agency. The plaintiff was a stockholder in the corporation and also had an agreement with it by which he was to solicit advertising contracts for the Company and receive a certain commission on the proceeds thereof to the Company. From May 1, 1912, to September 11, 1912, he worked for the Company under this contract. At the latter date he left the employ of the Company and opened a rival business.

Differences concerning the accounts between him and the Company led to this suit.

An amended "Statement of Claim" of the plaintiff was filed October 23, 1913. It asserts that money is due to plaintiff as earned by him "as commission on contracts or orders secured by plaintiff and delivered to said defendant for execution from and subsequent to May 1, 1912", which commission is due under an agreement of the defendant "to pay plaintiff 20 per cent commission on all work secured by him." The state-

ment proceeds: "Acting upon and in pursuance with the terms of said agreement or contract, plaintiff secured contracts or orders for work from concerns hereinafter set out and delivered same to and they were executed by the defendant, on which said commission of 20% is due plaintiff and remains unpaid." Then follows a list of twelve "contracts or orders" secured, with the amount of compensation for each to the Company, aggregating \$15,166.21. Twenty per cent of said amount - \$3033.24 - is asserted to be due from the defendant to the plaintiff. The plaintiff also claims in said statement that there is due to him from the Company in addition to this sum, "\$1225 for dividends duly declared on his holdings of the capital stock of said corporation." These sums aggregate \$4258.24.

The defendant corporation filed the affidavit of its President to the merits of a defence and a set off. This affidavit denies the agreement to pay the plaintiff 20% on all work secured by him after May 1, 1912, and says that it was the duty of the plaintiff in respect to all the contracts set out in his "Statement of Claim" not only to obtain the initial order, but to perform certain other services until each job was fully filled. This the plaintiff, the affidavit asserts, did not do except as to five of the twelve orders mentioned in his statement of claim. As to one of the twelve the defendant denies that it filled or received payment of such an order secured by the plaintiff, and as to another, that the plaintiff is entitled to no compensation because he obtained the order before May 1, 1912, while he was working on a salary basis. As to the other five the defendant recites different and less sums as the "amounts billed" to the customers and a less amount of commissions earned by the plaintiff under the agreement. It adds, however, \$20 as due the plaintiff on a contract not

mentioned by him in his statement of claim.

The defendant denies that there is due to the plaintiff \$1225 for dividends, as he alleges, and further maintains that \$285 should be deducted from the \$1287.37 which alone it admits would be due him "if he had before the suit was brought completed his services on all the orders obtained by him", because of his failure to so complete them, and because, although he was to be credited only as the work had been entirely completed and billed to the customer, there was about \$1500 of items not so billed until after this suit was begun. Therefore the defendant computes \$1001.52 as due from the defendant to the plaintiff, against which is to be off set \$1948.83 due to the defendant from the plaintiff for overdrafts, leaving the plaintiff debtor to the defendant in the sum of \$947.31. The plaintiff made no defence as to the set off, and thus his claim was reduced from \$4258.24 to \$2309.41.

The Court below rejected the claim of the plaintiff for the "dividends" included in the plaintiff's statement. Deducting these from the plaintiff's claim left \$1084.41 which he maintained was due for commissions. The Court found due to him and gave him judgment for \$921.17. Of this the appellant says in his argument to us, that it "was practically all of appellee's claim after deducting overdrafts."

The appellee says: "The record does not reveal how the trial Judge arrived at his figures, but it is quite apparent he adopted the view contended for by appellee and allowed 20% commission on all contracts, disallowing certain few small items which went to make up the total amount claimed on each contract."

Although the defendant prayed and perfected this appeal, the plaintiff (appellee here) has assigned cross-errors

which cover the contention that the "dividends" claimed by him should have been allowed in the judgment. It may be well to dispose of this controversy first. We think the Court below was right. No action at law accrues against a corporation for undivided profits. There must be a dividend declared by the directors. *Dennis v. Joslin Mfg. Co.*, 19 R. I. 606. There is no evidence of any such declaration in this case. The plaintiff relied on credits in books of account of the corporation. This would not be sufficient in any event, but it is rendered still more ineffective to supply a cause of action by the fact that the evidence shows that the entries were made at the order of the plaintiff himself, and fails to show, as we think, any affirmance or consent, formal or informal, by the other directors. Such entries cannot effect an estoppel against the corporation.

The next question to pass on is the claim of the defendant that deliveries of the advertising material ordered in certain cases amounting to \$1591.75 (on which the commissions would amount to \$285.85 according to the defendant's version of the account, and \$318.35 according to the plaintiff's) did not take place until after suit was begun, and that therefore the transactions could not properly be taken into account therein, inasmuch as Davis, it is claimed, was not to receive credit for his commission until "the goods were billed out and delivered." These items were not included in the first Statement of Claim filed, but were brought into the case by the amended Statement of Claim filed October 23, 1913.

It is not necessary, in our opinion, to pass on the question whether this \$285.85 or \$318.35, as the case may be, was or was not due under the evidence when the suit was brought. Conceding that it was not, we think the

amendment was allowable, the evidence admissible and the judgment correct which took it into account.

The case of *Doherty v. Schipper & Block*, 157 Ill. App. 413, was not indeed on all fours with the one at bar, as counsel for appellant point out, but it is of interest as showing that the Appellate Court of the Second District thought that, in the light of subsequent opinions, language on which the appellant in this case relies, used in *Hamlin v. Race*, 78 Ill. 422, needed modification. When the Supreme Court affirmed the judgment of the Appellate Court it used language in its opinion, evidently with deliberate intent, which to our mind fully covers the right under proper pleadings or amendments (if not indeed without such amendment) to bring into a suit items of the same nature as those originally sued for which mature between the commencement of the suit and the trial. Speaking of an employee who may, under certain circumstances, treat the contract of hiring as continuing, it says:

"And if the suit is not commenced, or, if commenced before, not tried, until his term of employment has expired, he may recover the contract price of his wages," etc.

Doherty v. Schipper & Block, 250 Ill. 128.

Of this statement the appellant says that it is a pure dictum which cannot overrule *Hamlin v. Race*. But it affirmed without remark the decision of the Court which had in its opinion criticized that case. We think if the statement was a dictum, it was "a judicial dictum" which we ought to follow, especially as it seems in furtherance of justice and simplicity of action and in no way could have injured nor even embarrassed the defendant in his defence. As appellee says, "It merely brought before the Court controverted matter of the same nature as submitted by the original pleadings, the effect of which could only tend to increase the amount claimed. * * * In fact it was an advantage to him" (the defendant) "in that it

avoided the necessity of his making defense to a subsequent suit involving the same subject matter."

The other matters complained of by the appellant we think were matters of fact purely, on which, after considering the by no means harmonious testimony as it appears in the record, we have no reason to believe our decision should be different, or, if different, any more likely to be correct and just than that of the trial Judge. So far as he decided in favor of the plaintiff and so far as he restricted the plaintiff's claims, we are ready to concur with him.

The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

JOHN N. CONSTANTAS,)
 Appellee,)
 vs.)
 PETER GREGORIS,)
 Appellant.)

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

192 I.A. 376

MR. PRESIDING JUSTICE BROWN DELIVERED THE OPINION OF
THE COURT.

A dispute between partners (the appellant and appellees) concerning a dissolution of the partnership and an accounting was the basis of this suit. It was therefore a proper subject of equity jurisdiction.

1 Story's Eq. Jurisprudence, 12th ed., chap. 15;
Strong et al. v. Clawson, 5 Gilman, 346.

When a court of equity acquires jurisdiction for one purpose, it will retain it for all purposes necessary to complete justice, although that requires that some matters be passed upon which would not otherwise be cognizable in that Court.

Morgan v. Roberts, 38 Ill. 65, p. 80;
Sherlock v. Winnetka, 59 Ill. 389, p. 400;
Pool v. Becker, 92 Ill., 501, p. 509.

Thus having acquired jurisdiction for the purpose of correcting a mistake in the terms of a promissory note, a court of equity may retain it for the purpose of ascertaining the amount due and enforcing its payment, although such ascertainment and enforcement of themselves are purely legal proceedings.

So in this case, the Court having undoubted juris-

diction of the issues raised by the bill and answer, concerning which a mass of evidence was taken, and concerning which the Master reported, it was entirely within the jurisdiction of the Court to adjudicate that a judgment note of \$1500 dated October 25, 1906, signed by the appellee and given to the appellant, and which the Court found it was agreed should be paid out of complainant's share of the profits of the business of the firm, had been in fact paid or satisfied in an accounting before judgment had been entered on it at the suit of the appellant. It was also within the jurisdiction of the Court, having so found, to enjoin perpetually the appellant from collecting or attempting to collect said note or the judgment entered on it, and ordering the appellant to deliver it up to the Clerk of the Court for cancellation.

This power and right of the Court, which was expressly recognized by a stipulation between the parties, the parties "waiving all objection thereto", entered into during the pendency of the cause, was not affected by the fact that after a report of the Master had come in, recommending the appointment of a receiver for the corporation and an accounting under the direction of the Court, as well as the enjoining of this \$1500 note and judgment, the parties chose by agreement between themselves to dissolve the partnership and settle all other matters in dispute between them except this note and judgment. The jurisdiction had been properly taken and it remained "to do full justice between the parties."

This disposes of the issue of law raised by the appellant in this appeal. The only other matter in controversy is one of fact.

Appellant says the decree is erroneous in its find-

ings of fact that the note in question had been satisfied before judgment was entered on it, that such finding is against the manifest weight of the evidence.

Of this issue it is only necessary for us to say that we do not agree with appellant. The testimony is conflicting and contradictory, and the question for the Master and the Chancellor was largely one of the veracity of the witnesses.

Our conclusion on consideration of the whole record coincides with that of the Master and Chancellor. The documentary and circumstantial evidence support the story of the appellee and throw doubt upon that of the appellant and his corroborating witnesses.

The decree of the Circuit Court is affirmed.

AFFIRMED.

GEORGE C. SCHREIDER, Executor
of the last Will and Testament
of EMILIE SCHREIDER, deceased,

vs.

THERESA DOESLAERE,

Appellant,

vs.

GERTRUDE SCHREIDER,

Appellee.

ALFRED WICK SUPERIOR COURT
OF COOK COUNTY.

1921 A. 377

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

In this case George C. Schreider, executor of the last will of one Emilie Schreider, deceased, filed a bill of interpleader in the superior Court, alleging that he had a certain sum (afterward found to be \$436.30) as the distributive share of the estate of Emilie Schreider, which was to go in the distribution of the estate to one William A. Schreider; that he had received demands for said sum from one Gertrude Schreider and from one Theresa Doeslaere, respectively, each claiming that William A. Schreider has assigned the said fund to her. He made Gertrude Schreider and Theresa Doeslaere parties defendant to the bill and asked that they be required to interplead. Each answered, claiming to have an assignment in writing of the fund.

A decree of interpleader was entered on said bill, in which it was ordered that out of the fund (which had been paid by the complainant to the Clerk of the Court) the Clerk of the Court should pay to the complainant or his solicitor \$10 for "filing fee" and \$50 for solicitor's fee, and that the costs of the proceeding "including said sum of \$60

so paid to the complainant be, upon the final decision of the cause, taxed against the losing defendant, being the defendant whom the Court shall find not to be entitled to said fund."

The defendants Gertrude Schreider and Theresa Doeslaere were ordered to interplead and settle the matters in controversy in this suit between themselves.

After a hearing in open court of the controversy between the interpleading defendants, a decree was entered by the Court on October 11, 1913, adjudging the fund to Gertrude Schreider. The decree contained the following paragraphs:

"It is further ordered, adjudged and decreed that Theresa Doeslaere pay the court costs of this proceeding and the further sum of Sixty (\$60) Dollars, which is \$10 court costs for filing the bill and Fifty (\$50) Dollars allowed to the complainant's solicitor as fees.

It is further ordered, adjudged and decreed, that the Clerk of this Court pay over all of the monies paid to him by the complainant herein, to await the determination of this suit, to Gertrude Schreider, less the deductions heretofore provided for in the decree, etc."

From this decree Theresa Doeslaere appealed and the appeal is now before us for disposition.

The decree is plainly erroneous in that it orders Theresa Doeslaere to pay the solicitor's fee of the complainant, George C. Schreider.

The original decree of interpleader entered May 14, 1913, was erroneous in allowing this payment out of the fund to the complainant, and the decree appealed from is equally erroneous in ordering Theresa Doeslaere to pay it.

Chapin v. Baks, 57 Ill. 298;

Delta & Pine Land Company v. Sherwood et al.

187 Ill. App. 167;

Metropolitan Life Ins. Co. v. Lindsey &
Corbett, No. 20772 in this Court; opinion
filed March 29, 1915.

Of course it is open to us to modify the decree by striking out this order and to affirm the decree as modified, or to act on the suggestion of the appellee and affirm the decree on a remittitur to be filed by her. But we have no disposition to do so in this case. While we do not feel called on under the circumstances to decide either way on the propositions advanced by the appellant, that the decree was against the manifest weight of the evidence and that there was no evidence sufficient to base the decree upon, we do hold that the evidence was extremely unsatisfactory and incomplete, and that it is well that the controversy between the claimants should be again tried. At such a trial it is to be hoped the history of each written assignment may be traced by the testimony of competent witnesses until they appeared in the hands of appellant Theresa Dooslacre, one in a mutilated condition. It cannot be impossible that this should be done.

The decree will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

THE BILLBOARD PUBLISHING
COMPANY,

Appellant,

vs.

F. C. MCCABE,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

1921 A. 334

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

Prefixed to the opinion in Billboard Publishing Company v. McCabe, 180 Ill. App. 525, will be found a complete statement of everything necessary to an understanding of the case at bar up to February 24, 1911, on which day the Billboard Publishing Company sued out from this court a writ of error (cause No. 17366), to reverse an erroneous order of dismissal by the Circuit Court on March 16, 1910, of the bill in equity, the final disposition of which by the Circuit Court on March 21, 1914, was by the decree which is attacked in the present appeal. If anything is wanting in that statement to a complete explanation of the situation, it will be supplied by reference to Billboard Publishing Company v. McCabe, 181 Ill. App. 227. Referring, then, to these two opinions, we shall begin this statement at a point reached in the statement in the 180 Ill. App. 525.

By the opinion following that statement it will be seen that May 26, 1913, we reversed the order of dismissal entered on March 16, 1910, as erroneous and remanded the cause to the Circuit Court "for such other and further proceedings therein as to justice shall appertain."

But it will also be seen that we expressly held that the order of dismissal, although inadvertent and erroneous, was not void. In *Hillboard Publishing Company vs. McCarahan* (No. 17253), 180 Ill. App. 542, and in *Hillboard Publishing Company v. McCarahan*, No. 17392, 180 Ill. App. 544, we repeated our opinion that the order of March 10, 1911, was not void although erroneous, and gave judgment in these cases in accordance with that holding. In the first of these cases we said:

"Long before the petition for the rule was filed and long before the action complained of as contempt was taken, the injunction had ceased to exist by the dismissal of the bill on which it was founded. There could be, therefore, no contempt in disregarding it."

In the second case we said:

"The order of dismissal of the bill in the Circuit Court of March 10, 1911, was not void or a nullity. In refusing to take part in the trial of the law suit before Judge Windeas, the defendant was acting at his peril. There being no injunction at that time in force, the Court of law and its officers were right in proceeding when called into action."

Our views thus expressed have a bearing on the case now before us.

June 28, 1913, the mandate of the Appellate Court reversing the order of March 10, 1911, which dismissed the bill and remanded the cause to the Circuit Court "for such other and further proceedings as to law and justice shall appertain," was filed in the Circuit Court. July 25, 1913, an order was entered by the Circuit Court giving leave to the complainant to file a supplemental bill, and ordering an injunction pendente lite against McCarahan's prosecuting the suit at law (in which judgment had been rendered December 21, 1910, two years and a half before) and prosecuting certain suits on bonds relating to the judgment obtained in that case, and taking any further proceedings to collect said judgment. This

order for an injunction was conditioned on certain undertakings by the complainant regarding certain other connected suits, not necessary here to recite.

The supplemental bill filed on July 25, 1913, set out the proceedings which have been recited in the opinion of this Court before mentioned, and the reversal by this Court of the order of dismissal and certain proceedings taken by McCarahan to collect the judgment of December 21, 1910, in the case at bar, and prayed that all suits and proceedings to collect that judgment should be restrained and that the Billboard Publishing Company should be allowed damages against McCarahan for violating the injunction heretofore entered in this case."

It also prayed that "the accounting now pending before one of the Masters in Chancery of the Court be continued and concluded and that said accounting include all the matters in controversy" between the Billboard Publishing Company and McCarahan.

August 26, 1913, McCarahan was granted leave to withdraw his answer theretofore filed to the original bill of complaint in this cause, and to file instanter a plea to the said original and supplementary bill.

On the same day McCarahan withdrew his answer and filed a plea to said original bill and supplementary bill, in which, after setting forth the history of the action at law in assumpsit brought by McCarahan against the Billboard Publishing Company on February 26, 1908, (prior to the filing of the original bill in the case at bar) to its culmination in the judgment at law of the Circuit Court December 21, 1910, and alleging that the said action was for

the enforcement of the same rights and interests in behalf of McCarahan and grew out of the same employment that was referred to in the original and supplemental bill in the cause at bar, - he averred "that the said judgment and said several proceedings in said suit at law in said Circuit Court of Cook County are a final determination in favor of this defendant against complainant in this cause of all matters and things growing out of the relation and employment set out in said bill and their determination is final and in full force and effect."

November 15, 1913, an order was entered reciting that a "demurrer" had been made to the plea, and that the demurrer had been overruled and "said plea adjudged and held sufficient for the purposes therein set forth."

Leave was given to complainant to file a "replication" to said plea within ten days. This irregular and improper proceeding of "demurring" to the plea may be considered to have been equivalent to "setting down the plea for argument."

Lester et al. v. Stevens et al., 29 Ill.155;

Dixon v. Dixon, 61 Ill. 324.

There does not appear in the praecipe transcript of the record filed before us any replication to the plea, but that one was filed is recited in the final decree entered March 21, 1914, and we may presume it was a denial of the allegations that the law suit was for the enforcement of the same rights and interests, and grew out of the same employment, that were the subjects of the bill and supplemental bill in this cause.

There was some evidence taken in which it appeared both by documentary evidence and testimony that the law suit and the chancery suits were concerning the claim for commissions by McCarahan for business obtained by him for the Billboard Publishing Company.

The decree found in some detail the facts concerning the history of both suits, and further found that the allegations of the plea were true and that the judgment and the several proceedings in said suit at law were a final determination in favor of the defendant herein, McCarrhan, and against the complainant herein, the Billboard Publishing Company, of all matters and things growing out of the relation and employment set out in the original, amended, supplemental bills and amended supplemental bill, and ordered them all and each to be dismissed at the cost of complainant and the temporary injunction theretofore granted in this cause to be dissolved.

The Billboard Publishing Company appealed from this decree, by assignments of error alleging it to be erroneous, and this appeal is now before us for disposition. We think the decree of the Circuit Court was correct. The underlying idea of the complainant in this case seems to be that nothing done while the order of March 10, 1910, stood unreversed could really affect the merits of this case or its proper disposition after this Court had declared the said order erroneously entered. We do not mean that this position is expressly stated or taken in the argument before us, but it is the idea which we cannot help believing has kept alive for so long in so many forms this litigation.

The appellant argues that "the causes of action," the "pleadings," the "issues" and "the facts" are different in the law suit and the suit in equity. Of course the "pleadings" are different. The one case was a suit at law by McCarrhan against the Billboard Publishing Company, and the other a suit in chancery by the Billboard Publishing Company against McCarrhan. The pleadings could not be otherwise than different.

But in our opinion "the causes of action", properly so-called, were not, and certainly "the issues" and "the facts" involved were not, different in the two cases. It is true that the Branch Appellate Court in *The Billboard Publishing Company v. McCarran*, 151 Ill. App. 227, decided that it would not hold that the discretion of the Court below had been abused in its refusing to dissolve the injunction originally granted against the prosecution of the law suit, and further held that under the overrulings of the bill the remedy in equity was the more adequate and satisfactory one.

But the injunction was dissolved by the dismissal of the bill, the law suit was prosecuted; the *Billboard Publishing Company* could have raised in defence to it, inconvenient as it might have been to it to have done so, every matter that it did raise in the chancery suit. It elected neither to do that nor to file a new bill, nor even, until long after, to sue out a writ of error on the dismissal of the old one, pertinaciously adhering to the erroneous theory that the order of dismissal was void. This it did at its peril, and we think it has now no ground of complaint.

The decree of the Circuit Court of March 21, 1914, dismissing the bills and dissolving the injunction, as before recited, is affirmed.

AFFIRMED.

190 - 20507

LUCE FURNITURE COMPANY,
a corporation,
Defendant in Error,
vs.

THE ALMINI COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1921A.386

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

For the same reasons for which we affirmed the judgment in *Quinlan v. The Almini Company, No. 21654*, in which an opinion was filed April 12, 1915, we shall affirm the judgment in this case.

The differences are not vital or important; the essential questions involved are the same.

There are two Almini Companies connected with this litigation, which for convenience we shall designate Almini Company A. and Almini Company B. In the case at bar the Court below evidently found, first, that the Almini Company A., using the name under which it was doing business in the State of New York, of the "Almini Studios", purchased goods from the Luce Furniture Company, ordering some of them sent to Mary Mann in Rochester, New York, and some to A. C. Fickesisen, Syracuse, New York, and that the goods were so shipped.

The plaintiff in error is very insistent that this was not sufficiently proved. We think the depositions, with the correspondence introduced, entirely justify this finding.

The Court found, second, that before these goods were paid for, the Almini Company A. had ceased to exist by

the limitation of its duration at its organization, and that Almini Company B. had been fully organized for the purpose, as its certificate of organization expresses it, "of continuing and taking over one of the same name, whose charter expired by limitation of duration January 6, 1913; and third, that the capital stock of \$50,000 of the Almini Company C., with the exception of \$500, was paid, as its certificate recites, by "all of the property and assets of the Almini Company A.; and, fourth, that the preceding findings showed Almini Company B. to be liable for the amount claimed by the Tuce Furniture Company.

We think all these conclusions were correct. Certainly they conform to the justice of the matter, and we can see no want of conformity with the law.

The point made by the plaintiff in error concerning the want of power of either corporation to "trade in furniture" is not well taken. No such defence could be made to a suit for the purchase price of goods like these, of which the ordering party accepts the benefits, even if the purchaser could not, as the counsel for defendant in error say it can, and as we also think it can, "be reasonably considered as fairly incidental to the business of interior decoration."

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

213 - 20633

BULLARD-JOHNSON LAND AND
SHEEP COMPANY, a corporation,
for the use of J. M. BISHOP,
Admr. of the estate of J. M.
WILSON, deceased,

Appellant,

vs.

OREGON SHORT LINE RAILROAD
COMPANY, a corporation,
Appellee.

APPEAL FROM JUDICIAL COURT
OF OREGON.

1921 A. 387

DELIVERED THE OPINION OF THE COURT.

The questions in this case bear much resemblance to those presented to us in Goodwin v. Oregon Short Line Railroad Company, 70-2256 in this Court, in which we filed an opinion January 23, 1913, that is not as yet printed in the reports. We must repeat herein what we said in that case - "It seems to us that reason and the logical conclusions to be derived by analogy from the general doctrines of agency coincide with the weight of authority in sustaining this statement to be found in the opinion in Gulf, Colorado & Santa Fe Railway Company v. Hodge, 13 Texas Civil Appeals Reports 843:

'A local station agent in charge of a railroad company's business at a particular station is presumed to have authority to represent the Company in all matters connected with the transaction of its business at that particular station, but he is not presumed to have authority to act for the Company at other stations, and when he attempts to do so, his act, unless ratified, will not bind the Company.'

This proposition was laid down in the case cited as applying to the alleged contract of the station agent in behalf of the Company to furnish cars on the line of his own road but at another station. If this be the law affecting such an alleged contract, a fortiori, it is true that a

station agent has no such "implied," "presumptive," "apparent" or "incidental" authority to make a contract binding the road to furnish cars at a particular date on a foreign road."

In reaching our conclusions in the case at bar we have given appellant the benefit of the doubt, if there be a doubt, on the question whether the suggested or proposed testimony of Mr. Dunn, the station agent of the Idaho Northern Railroad at Emmet should be considered as in the record. If it can properly be so considered, it is because in effect the colloquy between the Court and counsel concerning it involved or implied a stipulation to that effect; in other words, that it was admitted that Dunn would testify as the counsel for the plaintiff asserted that he would. The colloquy is given verbatim in the Bill of Exceptions and as recited also in the appellee's brief and argument. The impression it makes on our minds is in line with the contention of the appellant regarding it. We have therefore not deemed it necessary expressly to pass on the point urged with insistence by the appellee, that it is not to be considered. But so considering it, we agree with the trial Judge that it proves no liability of the appellee.

The evidence for the plaintiff (which was all that was heard in the cause) with all that it was suggested that Mr. Dunn would testify to, giving to it a construction favorable to the plaintiff, is only to the effect that August 6, 1907, the plaintiff gave an order to or made a request of Dunn, the agent of the Idaho Northern Railroad Company at Emmet, Idaho, that sixty cars should be furnished it for the shipment of lumber, at Emmet, Idaho, - 20 on October 1, 20 on October 5, and 20 on October 10, 1907; that Mr. Dunn requested or "placed the order", as appellant phrases it, with a Mr. Coyle, who was the local agent of the defendant, the Oregon

Short Line, at Nampa, a junction point of the Idaho Northern Railroad Company with the Oregon Short Line, and that Mr. Coyle, "in the usual course of his employment, as he always did with orders received by the Oregon Short Line Railroad, placed the said order with the Chicago Dispatcher of the Oregon Short Line Railroad Company" at Nampa, a Mr. Collopy; that shortly prior to the first of October the defendant, through its Vice-President, Mr. VanDeusen, had a telephone conversation with Collopy, in which VanDeusen inquired about these cars, and that Collopy informed him that he had received the request but that he didn't know "for sure" whether "they were going to get them on time," but the appellant would get them as quick as "they" got them; (presumably he meant as soon as the Railroad got them); that on various occasions afterward VanDeusen had conversations with Collopy about the cars and Collopy would say "that he didn't know when he would get them, that when they got on his district so he could find them he would tell us" (the plaintiff.)

All this, under the holding which we made in *Goodwin v. Oregon Short Line Railroad Company*, supra, falls short of proving any liability of the defendant corporation for damages resulting from the failure to have the cars at Maet at the times specified.

Neither Dunn, the station master of the Idaho Northern Railroad Company at Maet, nor Coyle, the local agent of the defendant at Nampa, nor Collopy, the chief train dispatcher at Nampa, is shown by it to have had the authority to bind the defendant to have cars on a station off its own road and on a foreign road at the times specified; nor, indeed, if it comes to that, does it show any promise on the part of any agent of the defendant, authorized or unauthorized, to have

them there. It might well be that, as it was said Dunn would testify, if allowed, he, Dunn, "placed this order - that is, the order given him through the request to do so," with Coyle, the local agent of the defendant at Nampa, and that Coyle "in the usual course of his employment, as he always did with orders received by the Oregon Short Line Railroad Company," placed the said order with the Chief Dispatcher of the Oregon Short Line Railroad Company, Mr. Collopy, and yet Mr. Collopy not have made any promise or entered into any contract for the defendant to have the cars there, and the testimony of Van Deusen as to his conversations with Collopy would seem to indicate very strongly that he did not.

But in any event we do not think that either Collopy or Coyle can be presumed to have had authority to bind the Oregon Short Line to put cars at a particular station on a foreign road at a particular time, and certainly no express authority is shown.

As it was in the Goodwin case, so in this case, it is argued that the furnishing cars by the defendant later than the dates specified was evidence to go to the jury of ratification of a promise by its agents to have them there on those dates. We do not think it would have been so, even did we think there was a promise by such agents. Nor do we think there is any greater force in the argument that there being evidence that at previous times requests to agents of the defendants to have cars at certain dates at stations on the line of the Pacific and Idaho Northern Railway (known as the P. I. N. line) and on stations of the line of the Idaho Northern Railroad had been successful in bringing cars of the Oregon Short Line there at the times specified, therefore the authority of the station agents or train dispatchers to make a contract to have them

there "must perforce be implied by their previous conduct in like matters and from the ratification given their previous like acts by the defendant."

The defendant denies that there is any such evidence, but if the testimony of VanDeusen can be so construed the argument is not valid.

The opinions in certain cases cited by the plaintiff lend it countenance, but we think it is against the weight of authority and the better reason. One's ability to oblige may not be equal to one's willingness to do so, and because a railroad company may be both able and willing to do so at one time ought not, in reason, to render it liable for the results of an inability to do so at another. Unless a binding contract was by the defendant made or implied for this particular occasion, the plaintiff has no ground of complaint against it.

We think it should be noted that unless we were misinformed when considering the Goodwin case, supra, and still continue mistaken, (which we find no reason in the record before us to believe) counsel for appellee has by inadvertence persisted in his brief and argument in confusing two different lines of railway. Emmet is, or was at the time of these transactions, on the line of the Idaho Northern Railroad, of which Dunn was an employe. This railroad ran from Emmet to Murphy, crossing the Oregon Short Line at Pampa. But the Pacific & Idaho Northern Railway is another line altogether, and Pampa is not its junction point with the Oregon Short Line. It runs from New Meadows to Weiser on the Oregon Short Line, passing through Evergreen, where the cars were required by Goodwin in the transactions involved in Goodwin v. The Oregon Short Line, supra.

We think there was no evidence tending to show

defendant's liability to go to the jury, and that the Judge of the Municipal Court rightly directed a verdict.

The judgment of the Municipal Court is therefore affirmed.

WILLIAM C.

APR 23 1915

DAISY B. PAGE,
Defendant in Error,

vs.

BRINK'S CHICAGO CITY EXPRESS CO.,
Plaintiff in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out to reverse a judgment of the Municipal Court of Chicago for \$124.16 in favor of Daisy B. Page, the defendant in error herein, and against Brink's Chicago City Express Company, the plaintiff in error herein.

The judgment was rendered in an action of tort tried by the Court below without a jury. The action was for damages done to the automobile of the defendant in error, which while being driven by her husband, Cecil Page (who was alone in the car) collided with another automobile. The claim of the defendant in error is that Mr. Page was forced to incur this collision (to avoid a more serious accident) by the negligence of a servant of the plaintiff in error, who was driving one of its express wagons. This driver turned sharply across the path of the automobile in a negligent and careless manner, the defendant in error alleges. This compelled Mr. Page to do the same with the defendant in error's car, which brought it, without his fault, into collision with an automobile immediately behind.

The defence is three-fold: First, that there was no sufficient evidence that the wagon turning in front of the defendant in error's automobile was one of the Brink

Company's wagons. Second, that even if this be conceded, there is no sufficient evidence of negligence on the part of the driver of the wagon; and, finally, that in any event there was contributory negligence on the part of Lage, the driver of the automobile, which must prevent recovery.

We think these were all questions for a jury, or a court which sits in the place of a jury. There can be no doubt that the first one was such a question, and that there was concerning it quite sufficient evidence for the plaintiff to overcome the evidence offered for the defendant, which was mostly negative and inconclusive.

As to the third question we are equally certain it was for the trial Judge, sitting in the place of a jury, and, moreover, we agree with him in his conclusion. It is only on the second question that we conceive there might be room for doubt. But whether a defendant was negligent is a question of fact - unless all reasonable men could come to but one conclusion regarding it. We do not think this is such a case, nor that there is a clear preponderance of evidence against the finding of the trial Judge.

The judgment of the Municipal Court is affirmed.

APPEAL.

575 - 19980

ALBERT BUCK, Administrator of
the Estate of AUGUST BOCKELMAN,
deceased,

Appellee,

vs.

O. W. ROSENTHAL,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

1931 A. 393

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings for review a judgment in favor of the administrator of August Bockelman against O. W. Rosenthal in an action of tort for wrongfully causing the death of Bockelman. Rosenthal was a contracting carpenter and contracted to lay a hardwood floor and prepare the surface thereof for a mosaic floor which was to be laid by Rees in Righelmer's saloon. The room occupied as a saloon was in the form of an L, with a frontage of 26 feet on Clark street extending north from a point 26 feet north of the corner of Van Buren, and a frontage of about 20 feet on Van Buren street extending west from a point about 70 feet west from the corner of Clark street. As originally constructed, 12 x 12 wooden beams were placed under the center line of that portion of the saloon which fronted on Clark street. The west end of the first beam from the west was supported by a stairway wall and the east end rested on an iron column eight feet from the stairway wall, thus making the first span a span of eight feet. Other beams extended east and rested on and were supported by iron columns placed twelve feet apart. Columns were placed on the first and upper floors on top of the basement columns to support the upper part of the building. As

originally placed, the column placed on the saloon floor prevented the placing of the saloon fixtures, after the change, where it was desired to place them. The column was moved and the column in the basement was also moved east four feet and placed beneath the column on the saloon floor and there set up on a cement base on the floor of the basement. This increased the span between the stairway wall and the first column from eight feet to twelve. The eight foot beam was taken out and replaced by a twelve foot beam, which reached from the stairway wall to the first column. The old wooden floor was a foot above the level of the sidewalk. Rosenthal contracted to lower the floor a foot. To do so no change was made in the beams, but the joists were cut off and lowered a foot and fastened in that position to the beams by angle irons and clevises.

At the time of the accident plaintiff's intestate was a laborer in the service of Rosenthal and was at work in the basement under the Higheimer saloon. On the morning of the accident Rees was using the floor space of the saloon above the first column for piling material. There was in it bags of cement, boxes of tiles, a barrel of water, and men were hauling from the sidewalk sand and placing it in such space. About six tons of sand were dumped on Van Buren street, but it does not appear what quantity had been taken into the saloon.

We do not think that the fact that Rees, the mosaic floor contractor, was found not guilty by the jury is conclusive against the right of plaintiff to recover against Rosenthal. It is not shown that Rees knew how the floor was supported, and he might place a greater weight on the floor than it, constructed as it was, would support without being guilty of negligence. As to Rees, the question for the jury was, not whether he placed too great a weight on the floor, but whether

he did so negligently. As to Rosenthal the question for the jury was, if they found that the floor was so overloaded as to make it unsafe and dangerous to work beneath it, whether Rosenthal knew or ought to have known that the floor was unsafe and dangerous. The adjudication that Rees was not guilty does not prevent the plaintiff from recovering against Rosenthal. The issues between the plaintiff and Rees and those between him and Rosenthal are different. To recover against Rees, the plaintiff was bound to show that Rees negligently overloaded the floor. To recover against Rosenthal, plaintiff was not bound to show that the floor was negligently overloaded, but only that it was unsafe and dangerous and that Rosenthal negligently sent plaintiff's intestate to work beneath a floor which he knew or ought to have known was unsafe and dangerous.

From the evidence the jury might properly find that it was the twelve foot beam that spanned the space between the stairway wall and the first column that first broke, and that while plaintiff's intestate was at work in the basement the floor with the materials thereon fell into the basement on him and so injured him that he died. Davies was Rosenthal's foreman in charge of the work on the Highliner saloon. He was at the saloon on the morning of the accident and before it occurred, was on the stairway and went down into the basement. Notice to or knowledge of Davies of the condition of the floor which fell was notice to or knowledge of Rosenthal of such condition.

The declaration contains but a single count. In that count it is averred that Rees negligently took into the building large quantities of material to be used in carrying out his contract and placed the same on the first floor of the building and negligently placed too large an amount of material

on said floor. "He overloaded the same to such an extent so as that said floor broke and fell down into said basement."

That plaintiff's intestate was working in the basement under the orders of Rosenthal in the discharge of his duty and in the exercise of ordinary care for his own safety when said floor above him, "being so overloaded as aforesaid broke and fell down onto him" and killed him. Appellant contends that in order to recover against Rosenthal under this averment,

plaintiff was bound to prove that Rees had negligently overloaded the floor. In this contention we are unable to concur. We think that the declaration well and sufficiently avers that the floor was overloaded by Rees, and that as against Rosenthal it was not necessary to prove that it was negligently overloaded by Rees. The case was tried on the theory that as against Rosenthal it was sufficient for the plaintiff to prove that the floor was overloaded and that Rosenthal knew it was overloaded, without any reference to whether it was overloaded negligently or otherwise. At the instance of defendant Rosenthal the jury were given among others the following instruction:

"The only negligence charged against the defendant Rosenthal is that he knew or in the exercise of ordinary care should have known that said floor was overloaded and that thereafter he sent Bockelman to work in the basement.

If you find from the evidence offered by and on behalf of the plaintiff that Rosenthal did not know that said floor was overloaded, and that the evidence offered by and on behalf of the plaintiff fails to show that in the exercise of ordinary care in the prosecution of the work he was doing, he should have known it was overloaded, or if you find such evidence leaves the question of whether Rosenthal did know that the floor was overloaded, or in the exercise of ordinary care should have known it, in doubt so that you are unable to say whether he did know or should have known such fact, if you find from such evidence that this is the fact, the plaintiff cannot recover against the defendant Rosenthal."

We think that whether the floor was so overloaded as to be unsafe and, if so, whether the defendant Rosenthal knew or by the exercise of ordinary care would have known that it was unsafe and dangerous when he sent Bockelman to work be-

neath it, were questions of fact for the jury, on which their verdict should not be disturbed.

The rule stated in *Condon v. Schoenfeld*, 214 Ill. 226, is that where a defendant moves for a directed verdict and offers no evidence, his rights must be determined as they existed when the motion was made, notwithstanding another joint defendant subsequently offers evidence in his own behalf. In our opinion the defendant Rosenthal was not entitled to a directed verdict in his favor on the evidence offered by the plaintiff, and the Court did not err in denying his motion therefor.

We think that the record is free from error, and the judgment is affirmed.

AFFIRMED.

267 - 20197

CITY OF CHICAGO,
Defendant in Error,

vs.

OTTO GROSS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

192 I.A. 398

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error Gross was found guilty of a violation of the following section of an ordinance of the City of Chicago:

"Every common, ill-governed or disorderly house, room or other premises, kept for the encouragement of idleness, gaming, drinking, fornication or other misbehaviors is hereby declared to be a public nuisance and the keeper and all persons connected with the maintenance thereof and all persons patronizing or frequenting the same shall be fined not exceeding \$200."

and a fine of \$100 assessed against him by a jury. The Court denied defendant's motion for a new trial and entered judgment on the verdict, to reverse which the defendant prosecutes this writ of error.

Herman Reichardt had a saloon and restaurant in Chicago. January 23, 1914, he was injured in a collision between a street car and an automobile and requested Gross to take his place in the saloon and restaurant for a couple of days and Gross complied with the request. The evening of the day following the day on which he took charge of the place he was arrested.

The evidence, in our opinion, does not show that Reichardt's place while Gross was in charge of it was kept for the "encouragement of idleness, gaming, drinking, fornication or other misbehaviors," and was therefore not sufficient to sustain the verdict. We think the Court erred in denying defendant's motion for a new trial, and for that error the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ALBERT ETAK,
Appellee,

vs.

MORAND BROTHERS, a
corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

1921 A. 404

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant corporation from a judgment recovered against it by appellee Etak in case for personal injuries alleged to have been the result of the negligence of the defendant. The defendant occupied a building five stories in height, in which was a single belt electric elevator running from the first to the fourth floor. On the fifth story was the drum around which the cable attached to the car was wound and unwound in raising and lowering the car. Plaintiff was a blacksmith employed in the shop of the defendant, and Frank Matthews was the foreman of the shop. Joseph Morand, the treasurer of the defendant, came to the shop and spoke to foreman Matthews. What he said does not appear. Matthews was killed and Morand was not asked what he said to Matthews. Directly after Morand left, Matthews went to the elevator shaft on the third floor, taking with him plaintiff and Blanchard. Blanchard took with him a crowbar, and plaintiff by the order of Matthews took with him a crowbar and an extension light cord. They went to the elevator shaft on the third floor where the car "was stuck", and Matthews sent plaintiff to the fourth floor to take an electric light from the top of the car and by means of the extension cord lower it into the shaft below the car. Plaintiff obeyed the order and returned to the shaft

on the third floor. Matthews and Blanchard were pushing a plank across the elevator shaft, and by order of Matthews plaintiff lifted up the end of the plank and it was shoved onto the floor. Matthews and Blanchard went on the plank and plaintiff stood on the floor alongside of the shaft. Matthews pointed to a piece of wood with his crowbar and said to plaintiff, "You see that piece of wood?" Plaintiff answered, "Yes, I see it. What do you want me to do?" and Matthews said, "I push it up on my side and you take your crowbar and push it up from the other, so we can push it easy." As plaintiff raised his crowbar the car fell and he did not know what happened, "because I lose myself.")

It is averred in the declaration that the plaintiff under the direction of foreman Matthews proceeded to remove a certain piece of wood that had become jammed between said elevator and the side of the shaft, and it is contended by appellant that there is no testimony that the men were attempting to remove a piece of wood or that a piece of wood had become jammed between the car and the side of the shaft. This contention is met and refuted by the testimony of the plaintiff and that testimony was not contradicted.

From the evidence the jury might properly find that at this time the cable that suspended the car had slipped off from the drum, but of course still passed around the shaft to which the drum was attached; that a piece of wood had lodged between the car and the side of the shaft and jammed and stopped the car; that the result of the slipping of the cable from the drum was to give the cable several feet of slack; that Matthews dislodged the piece of wood and the car fell until brought to a stop by the cable, which, as has been said, passed around the shaft to which the drum was attached; that by the falling of the car Matthews and Blanchard were

thrown from the plank, fell to the bottom of the shaft and were killed, and plaintiff was struck by the car, thrown onto the floor and thereby sustained the injuries for which he recovered.

Appellant further contends that there is in the record no evidence that anything was wrong with the elevator; that no one says that it was "fast" or "jammed" or that it could not be moved; that for all that appears the operator may have slipped away temporarily, intending to return and resume the use of the car. But the record shows that after a conversation with Morand, Matthews, the blacksmith foreman, went to the elevator shaft on the third floor; that he took with him two men and two crowbars; that he sent a man up to drop an electric light in the shaft below the car, and placed a plank across the shaft and went on it with another man and gave an order to plaintiff to assist in prying loose a piece of wood that was between the car and the side of the shaft. We think that from the evidence the jury might properly find as a fact, and not by presumption or conjecture, that the elevator was stopped by a piece of wood which was lodged between the car and the side of the shaft.

That the car was not lowered by Matthews or Blanchard, but, unexpectedly to them, fell, is clear. When plaintiff went to the elevator the car was about fifteen inches below the fourth floor. When Bauer went to the shaft a few minutes after the accident the car was about fifteen inches above the third floor. The distance between the floors was eleven feet. When the car fell Matthews and Blanchard were on a plank in the shaft beneath the car. We think that the jury might from the evidence properly find that it was the dislodging of the piece of wood while there was slack in the cable that caused the car to fall; that the

exercise of reasonable care for his own safety and the safety of those working under his orders required Matthews to ascertain before he dislodged the piece of wood which jammed the car, whether there was slack in the cable which would cause the car to fall if the piece of wood was dislodged; and might further find that under the facts and circumstances shown by the evidence the elevator was liable to fall in case the piece of wood by which it was jammed and held was dislodged, and that this was known or ought to have been known to Matthews, but was not known to plaintiff; that the act of Matthews in ordering plaintiff to work under the car constituted and was negligence of Matthews in his capacity of vice principal, and was therefore the negligence of the defendant corporation, and that as the direct consequence of such negligence plaintiff sustained the injuries for which he recovered. It follows from what has been said that in our opinion the Court did not err in refusing to direct a verdict for the defendant or in denying defendant's motion for a new trial.

We find no error in the rulings of the Court on questions of evidence or instructions, and do not think that the argument of plaintiff's counsel was improper.

The record is in our opinion free from error, and the judgment is affirmed.

AFFIRMED.

VINCENT SOTEK et al.,
Appellees,

vs.

KATE SOTEK et al.,
On Appeal of ANTONIA SOTEK.

APPEAL FROM SUPERIOR COURT
OF COON COUNTY.

1921A.406

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This cause was before the Supreme Court on the appeal of Antonia Sotek and two other defendants in 1911. The question on that appeal was whether Antonia Sotek was entitled to a homestead in the premises. In the opinion filed February 23, 1912, the facts transpiring up to the time of the entering of the decree appealed from are stated. (Sotek v. Sotek, 13 Ill. 302.) The Superior Court held that Antonia Sotek had abandoned her homestead in the premises in question. The Supreme Court held that no question of abandonment of a homestead could arise during the period when she had the entire estate and when it was uncertain whether the remainder would be accepted subject to the conditions in her favor; that there was no evidence tending to show an abandonment of her right and estate after the refusal to accept the remainder; and reversed the decree and remanded the cause. May 27, 1912, an amended bill and an answer by Antonia Sotek and her daughters, Josephine and Jennie, were filed and a decree entered. By this decree Antonia Sotek was adjudged to have an estate of homestead in the premises; the rights of the parties in the property in question were declared, partition ordered to be made and Commissioners appointed to make partition. The Commissioners reported that partition could not be made, and July 6, 1912, a

decretal order was entered directing the Master to sell the real estate and divide the proceeds among the parties entitled thereto; that out of the proceeds of such sale he pay to Antonia Sotek the value of her homestead, fixed at \$1,000. It was also adjudged that she had received rents and profits of the premises and expended money thereon for taxes, repairs, and other expenses; and the cause was referred to a Master in Chancery to taken an account of the receipts and expenditures of Antonia Sotek from and on account of said real estate. January 28, 1887, her widow's award was appraised at \$1805 and the appraisal was approved by the Probate Court. In the accounting she claimed credit for her widow's award with interest thereon.

Whether Antonia Sotek was entitled to be allowed in the accounting the amount of her widow's award, appears to be the only question in controversy on this appeal. There was a deficiency of personal estate, and she is presumed to have taken the remainder of her award, left after applying the personal estate, in money. The Master found that as to that portion of her award which was not paid from the personal estate or by relinquishment or selection, she had a lien upon the real estate of the deceased to the extent of such unpaid balance, and that upon determining the deficiency of such personal estate, she had, in the absence of any defense, the right to have the real estate of the deceased sold to pay the balance of said award; that in a proceeding by the executor to sell the real estate to pay such award, the order of the Probate Court approving such allowance is prima facie evidence of the amount thereof, but that the heirs have the right in such proceeding to contest the same; that where it is not satisfactorily explained, delay of seven years after the grant of letters of

administration in presenting a petition of this character is such laches as will bar any relief under it; and that unless such laches is satisfactorily explained by the party seeking the relief, the same will prevent the application of the real estate or the proceeds thereof to the payment of such award.

October 6, 1897, the Probate Court approved the final account of the executor of Anton Sotek, and ordered that because more than ten years had elapsed since the award of Antonia Sotek, his widow, had been so set off in said estate, and no claim had been made by her for the payment of such award, that such widow's award be and the same is thereby released to said estate. The Master found that the Probate Court had no jurisdiction to release and satisfy the award, but also found that her claim to such award was barred by laches. The Master found that there was a balance due from the widow, Antonia Sotek, on the accounting of \$2675.42. The report was approved September 29, 1913, and the decree approving the report permits deductions by Antonia Sotek of her own distributive shares of both the proceeds of the real estate and of the balance for rents, and found that she owes net \$2389.62, and orders that she pay that sum to the Master in Chancery for distribution by him to the parties entitled thereto, as directed by the Court. From this decree an appeal was perfected October 31, 1913.

The Master sold the premises and his report of such sale was approved. November 24, 1913, an order was entered that the Master distribute the proceeds of the sale among the parties entitled thereto, in accordance with their rights as declared in and by the decree of May 27, 1912. From this decree Antonia Sotek and her daughters, Josephine and Jennie, appealed. But one record was filed in this Court, and

none of the errors assigned relate to or question the order of distribution.

The appeal in this Court will be treated as an appeal from the decree of September 29, 1913, and that decree is, in our opinion, proper and will be affirmed.

APPEAL FROM ORDER OF NOVEMBER 24, 1913,
DISMISSED.

DECREE ENTERED SEPTEMBER 29, 1913,
AFFIRMED.

19 - 19183

H. L. HALLERIN,
Defendant in Error,
vs.
LOUIS BULTZ,
Plaintiff in Error.

BRANCH TO MUNICIPAL COURT
OF CHICAGO.

1921.A.414

MR. JUSTICE REASONABLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court to recover rent for the months of November, 1911, to February, 1912, inclusive, at the rate of \$37 per month, for certain premises in Chicago. The trial court entered judgment against defendant for \$42. The facts contained in the Statement of Facts signed by the trial judge are as follows:

"About the end of May, 1911, the defendant Louis Bultz, who was then in possession of a certain store belonging to plaintiff, entered into a parol lease with plaintiff of said premises for a period extending from that date up to April 30, 1912, at a rental of \$37 per month. He remained in possession and paid the rent at the agreed rate up to and including August, 1911.

"During the month of August, 1911, defendant advised plaintiff that he had arranged to sell the business conducted by him in the store, 1638 West Taylor Street, to Louis Sobel and Isidore Rubman, and asked plaintiff if he would give them a lease. Plaintiff stated that he would do this, but would require such parties to deposit the sum of \$90.00 with him, as security for the rent, and would require them to pay \$45.00 per month rent.

"Thereafter, on August 12, 1911, defendant sold out his business to Sobel and Rubman, including certain personal property contained in the store, and turned over possession to them. Defendant took a chattel mortgage on the chattels sold, from Sobel & Rubman, to secure the balance of the purchase price.

"The same day, plaintiff entered into a written lease with Sobel & Rubman, wherein he demised the premises in question to them for a period of two years beginning September 1, 1911, at a rental of \$45.00 per month. Sobel & Rubman paid plaintiff \$90.00 which, according to the provisions of the lease, was to be held by plaintiff as security for the faithful performance of the lease, - all with the knowledge and consent of defendant.

"Sobel & Rubman remained in possession until October 31, 1911, paying rent for the months of September, 1911, and October, in accordance with the terms of the lease. They then moved out and the premises remained vacant from the first of November, 1911, to the end of February, 1912. Plaintiff incurred expense to the amount of \$90.00 remodeling and repairing. Plaintiff testified that both at the time Maltz proposed Sobel & Rubman to him and at the time he gave the lease to Sobel & Rubman, he told defendant that he would look to him for any loss he might sustain and that defendant agreed to this. Defendant denied this and testified that no such conversation took place."

It is clear that the above facts operated as a surrender of defendant's verbal lease, and plaintiff could not afterwards assert that it was still in force. This is the holding in the following cases where similar circumstances were present: Williams v. Vanderbilt, 145 Ill. 238; Stobie v. Dilla, 62 Ill. 432, and Alschuler v. Schiff, 164 Ill. 268.

Defendant is not liable because of the verbal statement alleged to have been made by him to plaintiff that he, the defendant, would be good for any loss he might sustain. Even if it be conceded that such a verbal promise was made, it clearly is void under section 1 of chapter 95, Illinois Statutes, the act in relation to frauds and perjuries, where it is provided that no action shall be brought to charge a defendant upon a promise to answer for the default or miscarriage of another person unless such promise shall be in writing signed by the party to be charged therewith. We think it is too clear for further discussion that under the facts of this case there can be no recovery against the defendant.

The judgment is therefore reversed without remanding the cause.

REVEREND.

207 - 26134

CITY OF CHICAGO,
Plaintiff in Error,

vs.

W. W. QUINN,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

133 A. 419

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, the keeper of a saloon in the city of Chicago, was charged with keeping his place open after one o'clock A. M. in violation of a city ordinance. After hearing the testimony the trial court found the defendant not guilty.

From the evidence the court might reasonably have concluded that it was not clearly proven that the place was kept open after one o'clock, and we cannot say that such a conclusion is manifestly against the weight of the evidence.

It should be noted that no city ordinance has been preserved for our consideration. We cannot take judicial notice of city ordinances.

The judgment is affirmed.

AFFIRMED.

CHRISTIAN JOHNSON,
Appellee,

vs.

PAUL F. F. MOULLEN,
Appellant.

APPEAL FROM JAILHOUSE COURT,
COOK COUNTY.

1921A. 422

MR. JUSTICE McCLURE DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$3,000 obtained by plaintiff for personal injuries. As we have reached the conclusion that there should be another trial, we shall revert to the facts only so necessary to indicate the primary reason for this conclusion.

Plaintiff, a carpenter, was employed by defendant in the work of constructing temporary framework for the cement used in the construction and erection of a building called the Steele-Wedales building, at the north end of the Dearborn street bridge in Chicago. The construction proceeded in this manner: Upright steel columns were erected and these would be connected by steel cross-beams; both columns and beams would be covered with cement, and to do this wooden boxes were constructed around the columns and beams, and into these boxes the wet cement poured, and after it had hardened the temporary wooden boxes or coverings were removed. The boxes were simply molds into which the plastic cement was poured. That the boxes around the beams might not sag when the cement was poured into them, temporary wooden uprights, called shores, were placed under them. These shores were planks, usually about 2 by 10 inches and about 7½ feet long. Across the top would be nailed a cross-piece, giving the shore somewhat a T shape, and when the shore was placed in position it would be fastened by driving temporary

nails through these cross-pieces up into the bottom of the box. Ordinarily when thus nailed the lower end of the shore would stand about two or three inches clear of the floor, and wedges would be driven into this space so as to make the shores firm and to secure the proper levels. These shores were set six or seven feet apart, about three under one beam.

Plaintiff alleges that while engaged in wedging the shores which had already been placed in position under the boxes by the defendant, a shore nearby, so placed in position by defendant but through negligence not nailed to the box overhead, fell and struck plaintiff, inflicting injuries.

Upon the trial no witness testified that the shore which fell and struck plaintiff was one which had been before that placed in position under a box. The most that can be said is that after plaintiff was struck a shore was found lying on the floor by him which had no nail holes in the upper cross-piece. Neither plaintiff nor his witnesses undertake to say where this shore was standing just before it fell. It does not appear that after the accident any shore was missing from those standing in position under the beam where plaintiff worked, or from any other place nearby. There was testimony tending to show that plaintiff himself before placing shores in position frequently leaned them against the upright columns, and that he had been warned of the danger of their falling from that position. One witness testifying for the defendant said that the plank which struck plaintiff "was uprights leaning against another upright."

These considerations, with other details and circumstances in evidence unnecessary now to narrate, impel us to the opinion that justice will be better served by requiring

a new trial, at which it may be possible to show with reasonable certainty from whence the shore or upright in question fell. Plaintiff is bound to prove the negligence alleged in his declaration, and the single fact that plaintiff was struck by the falling shore is not sufficient.

For the guidance of court and counsel upon the next trial we note briefly one or two points made in argument by the defendant. We are of the opinion that it was not error for the court to give at the request of plaintiff instruction No. 2. We do not understand the rule that the master must exercise reasonable care to furnish a reasonably safe place for his servant to work, to be inapplicable when conditions are changing from time to time during the work of constructing a building. We believe there is some confusion in the reported decisions on this point, arising from an inaccurate statement of the rule. It is not the absolute duty of the master to furnish a reasonably safe place to work, but it is his duty to use reasonable care to furnish a reasonably safe place to work. We see no reason why any surrounding conditions and circumstances should relieve him of the obligation to exercise reasonable care in this respect. See Danbell-Elcock Foundry Co. v. Clark, 214 Ill. 398.

It was not prejudicial error for the trial court to modify defendant's tendered instruction on the assumption of risk, by striking out the words "and the law presumes plaintiff charged for such risks." These words merely repeat essentially what was already contained in the instruction, namely, that plaintiff "contracted with reference to" such risks.

After the verdict plaintiff obtained leave to file an additional count. To this defendant pleaded the

statute of limitations, and a demurrer to this plea was sustained, and, we think, correctly. The additional count set up only the same cause of action as the original declaration. Both counsel before us argue as if the additional count were based upon a negligent order, but we do not think this is warranted by anything contained in this count. It might also be said that there is no evidence in the record even remotely tending to show that the proximate cause of the accident was any order of the defendant.

For the reason above indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

MARY EDITH BERRY,

vs.

A. IRVING BERRY and
WILLIAM C. BERRY,

Appellants.

APPEAL FROM THE HIGH COURT.

192 I.A. 427

MR. JUSTICE MCKINLEY delivered the opinion of the court.

Plaintiff brought suit against defendants, who are physicians, because of an operation said to have been performed by them on her body without her consent. No negligence is claimed, but the charge is that defendants committed a trespass on her person. At the close of the evidence, upon motion the trial court directed the jury to return a verdict finding the defendants not guilty, and judgment of nil capiat ^{was} entered.

The evidence establishes that the defendant, Dr. BERRY, removed an ovarian tumor from the body of plaintiff, and that the operation was performed with a high degree of skill. Plaintiff does not allege that the trespass consisted in performing an operation or in removing the ovarian tumor. As plaintiff's counsel say in their brief, "the gist of the count is not that an ovarian tumor was removed, but that it was wilfully removed by performing an entirely different operation from the one authorized by plaintiff." In this respect the present case differs radically from the basis of claim in Ivatt v. Davis, 224 Ill. 300, where a judgment was sustained against a physician who removed the uterus of the plaintiff without her consent. In the instant case, by a digital examination the tumor was located in the body of plaintiff approximately between the rectum and the vagina, and it was removed through an incision made in the skin immediately between the

external openings of the genitals and the bowels. This is what plaintiff calls the "lower or rectal operation"; and her claim is that while she consented to an operation by making an incision through the walls of the abdomen she did not consent to this lower or rectal operation.

We are of the opinion that insofar as the defendant, Dr. Buford, is concerned, the uncontradicted evidence shows that plaintiff did consent to the operation which was performed upon her by him. In brief, that evidence is this: After his examination Dr. Buford wrote a letter to plaintiff's family physician, Dr. Frazier, of Louisville, Kentucky, where plaintiff resided. This letter is as follows:

"Dr. Coleman C. Buford,
100 State Street
Chicago.

Chicago, Ill. Jan. 19, 1910.

Dr. Don Carlos Frazier,
Louisville, Kentucky.

My Dear Doctor:

I examined Mrs. Gould in anesthesia in the presence of Drs. Kerlin and Bequesbourg. These gentlemen do a good deal of their surgical work together. Digital examination revealed a nodular tumor, the major portion of which was the size of a bantam's egg, located in the anterior surface of the rectum so that through bimanual examination I could very easily engage the entire tumor in my examining fingers. The tumor was hard, its base rather narrow and movable and there seemed to be a beginning invasion of the surrounding territory at its base. The speculum revealed the above described tumor, but it did not show loss of epithelial covering anywhere. In one locality there was a dilation of veins and I think that before many weeks the tumor will break down in this area.

The affliction has probably been benign or relatively benign until lately. I think therefore that malignancy has just begun.

In considering how this patient should be operated upon, I had thought of a dissection of the vagina off of the rectum, then loosening the rectum all around as high up as I could, drawing it down through the perineum and resecting the tumor, after which the gut would be closed, replaced and the perineum and vaginal wall repaired. If on further examination this route still appeared to be usable I think I would prefer to operate by this method; at least I should like to try this route first before entering the abdomen.

I cannot tell until the parts are exposed whether a section of the gut will have to be removed or the base of the tumor excised and the wound closed by transverse suture. This would be determined at the operation, first by clinical findings and second, probably, by making a frozen microscopic section which I would examine immediately. I am inclined to think that the anal end of the gut will not have to be disturbed and that the mesentery of the sigmoid, which is free and not infiltrated, will allow sufficient freedom to make an end to end anastomosis.

I have had a good deal of experience in connection with carcinoma of the rectum and frankly admit that the cosmetic results are not as good as patients and their friends would like to have them. Occasionally we are surprised by an excellent result, but more often the commonplace thing happens, the anastomotic sutures pull out or the patient suffers from fecal fistula. Either of these are more or less amenable to treatment after the operation when sufficient time has elapsed to remove a larger portion of the induration and consequent fixity of the parts resulting from repair.

Yours very truly,
Coleman G. Buford."

Dr. Frazier received this and subsequently showed and gave it to plaintiff. Shortly thereafter plaintiff presented herself to be operated upon by Dr. Buford at St. Joseph's Hospital in Chicago. She said nothing whatever to him concerning any objection to the method of operation outlined in the letter. In the operation which then took place Dr. Buford pursued the plan of operating proposed in his letter. Under such circumstances the only reasonable inference is that the operation as performed was done with plaintiff's knowledge and consent. Upon plaintiff's own showing, the directed verdict as to Buford was correct.

The other defendant, Dr. Berlin, was the Chicago physician to whom plaintiff had gone for an examination and advice some time before the date of the operation. He advised that an examination be made by Dr. Buford, who was "an expert surgeon." This advice was followed and the examination made by Dr. Buford, followed by the letter appearing above. Plaintiff testified that before the date of the operation she told

Dr. Kerlin that she would not consent to any rectal operation or any operation in the vicinity of the rectum. It does not appear that this objection or statement by plaintiff was communicated to Dr. Buford; indeed Kerlin, testifying in defense, denied that any such objection or statement was made to him by plaintiff; but we are now considering only the testimony on behalf of the plaintiff. The evidence shows that Kerlin performed no operation and took no part in the operation which was performed by Dr. Buford. We cannot find that Kerlin was a co-operator with Buford merely from the fact that Kerlin was present in the operating room at the time. It follows therefore that Kerlin could not be held liable for any trespass on plaintiff, for the reason that he performed no operation on the body of plaintiff. There is no evidence to support a verdict against him. If, considering the case against Buford separately, there could be no verdict against him, and if, after considering the evidence against Kerlin separately, there could be no verdict against him, now, then, could there be any verdict against both jointly? We are not persuaded by argument of counsel that such a verdict could properly be returned.

However, we prefer to base our decision upon the undisputed evidence that plaintiff, by submitting herself for operation with full and detailed knowledge of the procedure Dr. Buford proposed to pursue in operating, gave her consent thereto.

It might be said that from a consideration of the entire record, including the evidence both on behalf of the plaintiff and of the defendants, in our opinion no judgment against the defendants could be sustained, but as we have heretofore indicated, upon this appeal we have considered

only the evidence for the plaintiff.

The court was not in error in instructing the jury as he did, and the judgment is affirmed.

AFFIRMED.

JOHN D. CASEY, Administrator of the
Estate of Bernard J. Carroll, deceased,
Appellee,

vs.

WABASH RAILROAD COMPANY and CHICAGO
& WESTERN INDIANA RAILROAD COMPANY,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

1921 A. 430

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered judgment of \$3,000 against defendants for the death of Bernard J. Carroll, an employee of the Wabash Road, who was struck by a Wabash engine running under a contract of license on the tracks of the Chicago & Western Indiana Road near 26th street in Chicago. It was the custom for the Wabash Road to run a train for its employees, taking them in the morning to their various places of work along the line, and returning homeward with them in the evening. The railroad men call this train the "hurdy-gurdy."

Carroll was a switchman for the Wabash, stationed at the yards at Sanders, which is about an hour's ride from 26th street. The "hurdy-gurdy" would stop at 26th street for Carroll to board the train, and on the return trip would stop at this point to permit him to alight. There were six railroad tracks at this point running northerly and southerly, numbered consecutively from east to west, the most easterly track being No. 1 and the westerly No. 6. The work of elevating these tracks was in progress at the time of the accident. The east retaining wall, which was about twelve or fifteen feet high, was built, but the west wall was not yet constructed. The "hurdy-gurdy" on the return trip ran north on track No. 1, although one witness seemed to think it ran on track No. 3.

There was no passenger station at the point near where the train stopped at 26th street, and employees wishing to board it would climb up the sloping side of the elevation on the west and cross over the intermediate tracks to the "hurdy-gurdy," and in the evening when alighting the employees, in order to reach the street level, were obliged to walk westerly across the tracks and descend on the westerly incline of the track elevation.

It was about seven o'clock on the evening of January 10th, the time of the accident in question, when the "hurdy-gurdy" stopped near 26th street to allow Carroll and another workman, Reynolds, to alight. It was a dark night, described as "a bad, cold night, with snow on the ground." With Reynolds leading, they walked in a westerly direction across the tracks. As the work of elevation was in progress the way was rough and uneven, covered with loose ties, rails, stone and other materials scattered between the tracks. Each of the men had a lantern and, as Reynolds says, "we picked our way across the tracks." An engine with no cars was coming from the south on track No. 5, running at a speed which some witnesses estimated at eight or nine miles an hour, and another witness at twenty miles an hour. Reynolds says that before he reached this track he looked north and south but saw no headlight of any engine; that the first he knew of the approaching engine was when he was in the middle of the track upon which it was running, when he happened to raise his head and saw it only three or four feet from him; that he "hollered" to Carroll and just had time to step off the track when the engine went by. Carroll was struck and knocked to one side. The engine ran on some little distance before it was stopped; the testimony is

variant as to the exact distance it ran. Carroll died within a few minutes thereafter. Reynolds testified that he heard no whistle blown or bell rung, while the testimony of the crew on the engine is that both whistle and bell were sounded. Carroll was a man forty-eight years of age, and his condition of health and strength was good and his sight and hearing normal. Reynolds says he had no conversation with Carroll after they got off the "hurdy-gurdy" and that he did not hear the engine approaching until it was close to him.

He cannot undertake to determine the fact as to the presence or absence of warning sounds. The jury could reasonably conclude that it was more believable that both Reynolds and Carroll stepped in the path of the approaching engine unwarned by any whistle or bell, than that they walked into great danger unheeding the warnings which are claimed to have been given. The engineer saw the lanterns of the two men as they approached the track on which he was running; he knew the lanterns were carried by men and, from the direction they were going, that it was evidently their intention to cross his track. It must also have been apparent to him that there would be an accident if his engine and the men continued on their respective ways. The jury evidently believed Reynolds' story as to the absence of warnings, and we fail to find any sufficient reason for disbelieving the conclusion of the jury as to the negligence of the defendants. Neither shall we disturb the verdict on the question of contributory negligence. The situation required Carroll to exercise unusual care to avoid stumbling over the uneven and uncertain roadway on which it was necessary for him to walk. We cannot say as a matter of law that he was guilty of negligence because in the necessity of watching for dangers both from the north and from the south

over each of the several tracks, and at the same time of giving close attention to his footsteps in order to avoid injury from falling, he failed to observe the approaching danger on one of the tracks.

The testimony as to the habits of Carroll for care and caution was admissible. No witness saw Carroll when he was struck. Reynolds says Carroll was following him, but neither he nor the engineer say they saw the accident itself. In this respect the facts are like those considered in Chicago & Alton Ry. Co. v. Wilson, 225 Ill. 50, where it was held under such circumstances that it was not error to admit such testimony. We do not agree with counsel for defendants in the contention that the testimony as to the habits of care and caution should have been stricken out because there was not also testimony as to habits of sobriety. The cases cited do not so hold, either directly or inferentially. It would seem reasonable to presume that a person who is habitually careful and cautious would not be habitually intoxicated.

The jury returned a verdict for \$5,000, which the trial court for reasons which are not apparent required to be reduced by remittitur to \$3,000. It is argued that the verdict was for such an excessive amount as to indicate passion and prejudice on the part of the jury. This is a death case, and the widow testified that her only source of income was what her husband made. We do not think the verdict was excessive.

As to the refusal of defendants' tendered instructions B, C and D, touching the degree of care owing to the deceased, defendants cannot complain. Plaintiff's given instruction No. 1 covered essentially the same point, instructing that defendants were required to exercise ordinary care towards

plaintiff's intestate.

Other matters urged upon us are not of sufficient importance to require a reversal.

The judgment is affirmed.

APPROVED.

THOMAS, E. J.,
Defendant in Error,
vs.
E. F. FROCK,
Plaintiff in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

1321A. 433

PER CURIAM.

On motion of the defendant in error in the above entitled cause, the stenographic report filed by the plaintiff in error in the Municipal Court of Chicago on November 11, 1914, and made a part of the transcript of the record filed in this Court, is stricken from the transcript because not signed or filed in time. We find nothing in the record which justifies the order of the Municipal Court, made after thirty days had expired from the entry of the judgment, that the time for signing and presenting such stenographic report should be extended 90 days, and the order of extension entered as of September 14, 1914.

We do not think we can indulge in the presumption suggested and relied on by the plaintiff in error.

As there are no errors assigned which can be considered in the absence of the stenographic report now stricken from the transcript, the judgment of the Municipal Court is affirmed.

AFFIRMED.

11 - 18809.

JOHN B. DEVONEY,
Defendant in Error,

APPEAL TO

vs.

MUNICIPAL COURT

A. CHIAPPE, E. CHIAPPE and
J. LINALE,
Plaintiffs in Error.

OF CHICAGO.

MR. PRESIDING JUSTICE BAILEY
DELIVERED THE OPINION OF THE COURT.

1921 A. 435

Defendant in error, the plaintiff below, recovered a judgment by confession in the Municipal Court against plaintiffs in error and E. Chiappe for \$315 on a judgment note. Upon motion of the makers of said note, the judgment was subsequently opened up and they were given leave to file an affidavit of defense on the merits. The suit was discontinued as to E. Chiappe and proceeded to trial before a jury, which resulted in a verdict and judgment against ~~plaintiffs in error~~ ^{class and note} for \$315.

The evidence offered by ~~plaintiffs in error~~ ^{defendant in error} tended to show that in March, 1911, they entered into negotiations with ~~defendant in error~~ ^{plaintiff} for the purchase of certain improved real estate in Chicago, owned by Rafael Arrigo, for whom ~~defendant in error~~ ^{plaintiff} was agent; that as ~~plaintiffs in error~~ ^{defendant in error} were unable to speak or understand the English language the negotiations were conducted by all the parties in the Italian language; that the property was represented by ~~defendant in error~~ ^{plaintiff} to be 37½ feet in width and 100 feet in depth; that relying upon the representation of ~~defendant in error~~ ^{plaintiff} that the only encumbrance upon the property was a mortgage for \$5,000, ~~plaintiffs in error~~ ^{defendant in error} agreed to purchase the property for \$9,200, paying \$500 in cash, \$3,700 within five days after the title to the property was found to be

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good, and assuming the payment of the said mortgage and the taxes for 1910; that defendant in error then knew that the property was subject to an easement of passage way and to certain building line restrictions for the benefit of the owner of the adjoining lot; that the contract for the sale and purchase of the property was drafted by defendant in error in the English language, and as so drafted the property was to be conveyed subject to party wall agreements, building line restrictions and building restrictions of record; that plaintiffs in error then informed defendant in error that they did not understand the provisions of the said agreement as drafted in the English language and that they would not sign the same unless and until defendant in error gave them a paper written in the Italian language embodying the terms of the contract; that defendant in error then prepared and gave to them a paper written in the Italian language, which he signed and which he assured them was just like the contract written in the English language; that plaintiffs in error thereupon signed the contract as drafted in the English language; that the correct English translation of the said paper written in the Italian language is as follows:

"Chicago, March 11, 1911.

I, John B. De Voney, with these presents do guarantee to convey to brothers J. and E. Chicago and J. Little, the property in Chicago at Number 501 Franklin Street, and said parties agree to purchase for Nine Thousand Two Hundred Dollars (\$9,200) and pay all taxes for the year 1910. The above amount is to be paid as follows: Forty-two Hundred Dollars (\$4,200) in cash, and to assume a mortgage of Five Thousand Dollars (\$5,000), with interest at 6%. The title to the property must be free from all impediments.

Oak Savings Bank.
Jno. B. DeVoney."

Said evidence further tended to show that the note used on was signed by plaintiffs in error upon the representation of defendant in error that it was a receipt; that upon an examination of the abstract of title to the property

~~defendant~~
plaintiffs in error were advised for the first time that the property was subject to said easement and restrictions; that ~~defendant~~ plaintiffs in error then in apt time notified ~~defendant~~ in error of their refusal to accept a conveyance of the property burdened with said easement and restrictions.

The affidavit of merits or of defense filed by ~~defendant~~ plaintiffs in error sets up the facts as above stated, in substance, as constituting a defense to the action upon the ground of fraud and misrepresentation. Upon the trial, after the jurors had been examined by ~~defendant~~ in error and before they had been accepted by ~~defendant~~ plaintiffs in error, the latter asked leave to amend their affidavit of merits, which motion was denied. ~~defendant~~ Plaintiffs in error also then sought to interpose an oral plea of failure of consideration, but were precluded from so doing upon the ground that such plea had not been set up in the affidavit of merits. Notwithstanding its action in the respects mentioned, and its rulings in excluding all evidence offered by ~~defendant~~ plaintiffs in error to sustain the defense of failure of consideration, the court instructed the jury that if they believed from the evidence that the consideration for the note sued on had failed, their verdict should be for the defendants.

As the judgment must be reversed for other errors of law and the cause remanded for another trial, it is unnecessary to consider and determine the propriety of the action of the court in refusing leave to ~~defendant~~ plaintiffs in error to amend their affidavit of merits. It may properly be suggested that such motion for leave to amend the affidavit of merits should be accompanied with a statement of the matters constituting the proposed amendment.

The paper written in the Italian language and the English translation of said paper were pertinent to the

defense of fraud and misrepresentation interposed by ~~plaintiffs~~^{defendants} in error. These items of evidence offered by ~~plaintiffs~~^{defendants} in error were erroneously excluded. The rulings of the court in excluding these items of evidence were not merely harmless errors, as contended by ~~defendant~~^{plaintiff} in error, but the errors were seriously prejudicial to ~~plaintiffs~~^{defendants} in error. The same may be said respecting the rulings of the court in excluding the certified copies of the agreements creating the easement and restrictions upon the property. The easement constituted an encumbrance upon the property. Keian v. Bignian, 178 Ill., 341.

At the instance of ~~defendant~~^{plaintiff} in error the court instructed the jury that if they believed from the evidence that ~~plaintiffs~~^{defendants} in error were illiterate persons and ~~that~~^{because} the papers in question upon the reading thereof by ~~defendant~~^{plaintiff} in error, when they had a friend or friends nearby who might have been called upon to read the same for them, they were guilty of such negligence as would preclude them from any remedy for fraud in misreading. Aside from the fact that this instruction improperly infringed upon the province of the jury on the question of negligence, it is not based upon any evidence in the record showing or tending to show that ~~plaintiffs~~^{defendants} in error had a friend or friends nearby who might have been called upon to read the papers to them.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

334 - 19337.

154 - 19543.

J. J. WARREN,

vs.

INTER STATE REALTY COMPANY,
Appellee,

On Appeal of T. E. WALTERS, Garnishee,
Appellant.

J. J. WARREN,

Defendant in Error,

vs.

INTER STATE REALTY COMPANY,
Plaintiff in Error.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

192 L.A. 436

MR. PRESIDING JUSTICE BURKE
DELIVERED THE OPINION OF THE COURT.

No. 19337 involves the propriety of a judgment in the Municipal Court for \$2,400.00 in favor of the Inter State Realty Company against T. E. Walters, garnishee, for the use of J. J. Warren, and No. 19543 involves a judgment for the like amount recovered in said court by said Warren against said Inter State Realty Company.

In No. 19337 there was a trial by the court and the record is here on the appeal of the garnishee, Walters, while in No. 19543 there was a trial by jury, and the record is here on a writ of error procured by the Inter State Realty Company. The two causes have been heretofore consolidated for disposition in this court. Taking up the cases in their logical order, we first consider No. 19543.

The controversy had its inception in the following agreement:

*Aurora, Illinois. This agreement made in triplicate this 10th day of March, 1911, by and between T. E. Walters, B. F. Smith, G. V. Smith and J. J. Warren all of Aurora, Illinois, for the purpose of an organization to buy and sell

land. The principal plan is to act as selling agents for property owners. The organization to be known as the Inter State Realty Company. The immediate proposition is the entering into a selling contract with one H. J. Nagel of San Antonio, Texas, to sell twenty-three thousand acres situated in Webb County, Texas.

"The said B. F. Smith and G. V. Smith agreeing to finance the proposition. That is to say, they will furnish the money for the carrying of investigating said land, incorporation, office expense, etc. To start all necessary expense to further the sale of said lands, but not to exceed \$.....

"As soon as a part of said lands are sold and enough money or notes received to pay the running expenses then the said B. F. Smith or G. V. Smith shall be reimbursed for all money they have advanced for the above named purpose.

"As soon as they have received all of said money, then the said G. V. Smith, T. E. Walters and J. J. Warren shall share and share alike in all future profits of said organization until mutually dissolved.

"It is also agreed that the said G. V. Smith shall be elected treasurer of said organization.

"Witness our hands this day and year first above written.

T. E. WALTERS,
B. F. SMITH,
JOHN J. WARREN."

Following this agreement T. E. Walters and J. J. Warren went to Texas where they inspected the land, and entered into an agreement, which, omitting provisions not here involved, is as follows:

"This agreement made and entered into this, the 20th day of March, 1911, between Edna Emma Live Head and Land Company, incorporated, of the City of Dallas, State of Texas, party of the first part, acting by G. J. Correll, its president, Charante, duly authorized by resolution adopted by said corporation, party of the first part, and J. J. Warren and T. E. Walters of Chicago, Illinois, parties of the second part, Witnesseth;

"WHEREAS the party of the first part is the owner of approximately Twenty-five Thousand (25,000) acres of land in Webb County, Texas, near the station of Enfield, described and known as the Wolcott Ranch, all under lease, and the said parties of the second part are desirous of advertising and selling the said lands for the said party of the first part;

"Now, therefore, the said party of the first part agrees to and with the said parties of the second part as follows:***

"Fourth: The price for which said land shall be sold shall be such that the said first party will receive twenty (\$20) dollars per acre for the land. * * * *

"Fifth: The party of the second part shall have as their commission or profit for the sale of said land, all money or notes received by them over and above the stipulated price of twenty (\$20) dollars per acre,* * *

"Sixth: The said parties of the second part agree and bind themselves to contract for sale as much of said land as fifteen hundred (1500) acres on or before the first day of January, 1912,* * *

"Seventh: It is mutually agreed between the parties hereto that this contract shall be binding upon the parties of the first part and its successors or assigns, and that the parties of the second part may assign this contract to the Inter State Realty Company of Chicago, Illinois, and that when so assigned said Inter State Realty Company shall succeed to all of the rights of the parties of the second part under this contract and shall be bound by all of the agreements and obligations of the parties of the second part of this contract.

"Eighth: It is agreed between both parties hereto that this contract shall be and remain in force for a period of three years from the date hereof, at which time it shall lapse by its own terms.

"The failure of the parties of the second part or their assigns to make sales of said land as provided in this contract and especially in paragraph six thereof, shall, at the option of the party of the first part or its assigns, annul this contract in so far as it relates to land remaining unsold at the time of the forfeiture, and thereafter the parties of the second part, or their assigns shall have no claim against the first party relating to the land so remaining unsold.

"Witness the hand and seal of said corporation by C. J. Correll, its president, and the hands of the parties of the second part, in triplicate.

DUPRENEA LIVE STOCK AND LAND COMPANY
By C. J. CORRELL, President.
J. J. WARREN,
T. E. WALTERS.

Witness:
H. J. NAGEL."

In April, 1911, the Inter State Realty Company was incorporated under the laws of Arizona, and officers were elected as follows: President, T. E. Walters; Secretary, J. J. Warren; Treasurer, G. V. Smith; Vice-president and Sales Manager, G. W. Hoyt. The same persons were also elected directors of the corporation.

The agreement of March 23, 1911, appears to have been assigned by Messrs. Warren and Walters to the corporation, which thereupon proceeded to operate thereunder.

Shortly following the organization of the corporation, H. F. Smith, who had agreed to finance the proposition under the contract of March 12, 1911, after advancing some money, became dissatisfied and refused to be further bound by his agreement and thereupon T. E. Walters verbally agreed to assume and carry out the obligations of said Smith. On May 3, 1911, at a meeting of the directors and stockholders of the corporation, G. V. Smith tendered his resignation as treasurer and director and T. E. Walters was elected treasurer in his stead and E. J. Lavery was elected a director. The latter was a gratuitous holder of one share of stock, but had no financial interest in the corporation. At a meeting of the directors then held, at which Warren, Walters, Warren, Hoyt and Lavery were present, an action of Mr. Walters seconded by Mr. Hoyt, the salaries of Messrs. Walters, Hoyt and Warren were fixed at \$750 per month. Hoyt and Warren were employed as salesmen, and their duties consisted in finding prospective purchasers for the lands in Texas, accompanying such prospective purchasers upon a tour of inspection of the lands, and in closing contracts for the purchase by them of said lands. The corporation maintained an office in Chicago, and prospective purchasers were sought for by it in Illinois and elsewhere; and in the instances in which contracts were procured by it to be made with persons in Illinois, such contracts were there executed and delivered. The corporation was not licensed to do business in Illinois.

The statement of claim filed by defendant in error, Warren, upon which he recovered a verdict and judgment against the plaintiff in error corporation for \$2,489, was for \$3,400, as salary and \$85 for cash advanced for expenses.

Plaintiff in error corporation was organized under the laws of Arizona with authority to conduct the business of

real estate brokerage. It was not authorized to transact business in this state, and could not have procured such authorization. A corporation for the purpose of transacting the business of real estate brokerage may not be organized under any existing statute of this state, and under the provisions of section 2 of an Act in relation to foreign corporations, in force July 1, 1905, no foreign corporation may be authorized to transact any business in this state for the transaction of which a corporation can not be organized under the laws of this state.

It is clear from the evidence that plaintiff in error corporation was actually transacting business in this state under the direction and through the instrumentality of defendant in error, Warren, who is here seeking to enforce an alleged contract with said corporation for his services in that behalf. The corporation was not the owner of the lands in Texas for the sale of which it sought to procure purchasers in consideration of a commission to be received by it for its services in effecting such sales. Defendant in error, Warren, did not merely solicit persons in this state to purchase said lands, but in the instances in which he induced persons to agree to purchase said lands, contracts between such persons and plaintiff in error corporation were made and executed in this state, where said corporation maintained a general office for the transaction of its business, and where, when opportunity offered, it exercised its corporate functions.

The contract of employment entered into between plaintiff in error and defendant in error for the services of the latter in the capacity of a salesman necessarily contemplated the performance by defendant in error of services incident to the transaction of business which plaintiff

in error was not legally authorized to transact in this state. Defendant in error was a director of the corporation, and in the absence of proof to the contrary he must be held to have been conversant with the character and scope of the business in which plaintiff in error was engaged and of the manner in which such business was transacted. He must also be held to have known that plaintiff in error was not authorized to transact business in this state, and that the purpose for which it was organized prohibited such authorization.

The contract for the services contemplated to be performed and actually performed by defendant in error was illegal.

In Richon v. American Preservers' Co., 187 Ill., 334, it was held that where the contract between a principal and an agent grows directly out of an illegal transaction in the execution of which the agent has been concerned and in which he participated the law will not assist the principal to recover from the agent or assist the agent to recover from the principal. The contract in question was in its essence akin to a contract ultra vires the corporation.

With respect to the business to be transacted the contract of the corporation was beyond the power conferred upon it by existing laws and neither the corporation nor defendant in error are estopped, by assenting to it, or acting upon it, to show that such contract was illegal. National Home Bldg. Assn. v. Home's Savings Bank, 181 Ill., 35. See also Imperial Building Co. v. Chicago Board of Trade, 111 Ill., 100, and H. G. Brynjar Co. v. Dolans & Shorack Co., 239 Ill., 374.

Assoc. v. Home's Savings Bank, 181 Ill., 35. See also Imperial Building Co. v. Chicago Board of Trade, 111 Ill., 100, and H. G. Brynjar Co. v. Dolans & Shorack Co., 239 Ill., 374.

The conclusion at which we have arrived does not, however, preclude a recovery by defendant in error upon a quantum meruit, for the value of the services performed by him for plaintiff in error corporation. In this connection

it is proper to say that for the purpose of ascertaining the amount, if any, which defendant in error is entitled to recover, inquiry should be permitted respecting money received by defendant in error from plaintiff in error in payment for services and expenses. Other questions raised upon the record are not of sufficient importance to merit discussion. The judgment in case No. 19343 will be reversed and the cause remanded.

The reversal of the judgment in the case first considered, which judgment was the basis for the garnishee proceedings involved in No. 19337, now here on appeal, wherein judgment was entered against R. E. Walters as garnishee, necessarily requires a reversal of said judgment against the garnishee, but a consideration of the questions involved in the latter case compels us to the conclusion that such judgment must be reversed without an order remanding the cause.

The liability of appellant, Walters, is predicated solely upon his verbal undertaking to assume the obligation imposed upon B. F. Smith by the terms of the contract of March 13, 1911, upon the refusal of said Smith to be further bound by the terms of said contract.

The agreement by Smith to finance the proposition was an agreement running to the Inter State Realty Co., and of course the undertaking of Walters to assume said agreement was, if valid, an undertaking also running to said corporation.

The trial court held as a proposition of law, and properly so, that no recovery could be had in favor of the Inter State Realty Co. against the garnishee, Walters, on any promise or guaranty made by said Walters personally to appellee, Warren, personally.

We are not persuaded that the verbal undertaking of Walters to assume the obligation by Smith was not within

the statute of Frauds, as being an attempt to charge Walters upon a special promise not in writing signed by Walters, to answer for the debt of Smith, but clearly such undertaking or agreement on the part of Walters was not to be performed within the space of one year from the making thereof. The agreement of March 18, 1911, and the contract of March 28, 1911, heretofore set forth, must be construed together and they were necessarily so construed in this proceeding to determine the rights and obligations of the respective parties, the contract of March 28, 1911, being treated as having been assigned to and assumed by the Inter State Realty Co.

The contract of March 28, 1911, expressly provides that it shall be and remain in force for a period of three years from its date. The verbal undertaking, therefore, on the part of Walters, conceding it to have been valid either as an original or as a collateral agreement, was not to be performed within one year, but was to exist as a continuing obligation for the space of three years.

There was no right of recovery by the Inter State Realty Co. against Walters upon his said verbal undertaking, and it follows that said Walters was not liable as garnishee under any judgment recovered by the appellee, Warner, against said Inter State Realty Co.

The judgment in case No. 19337, being the garnishee proceedings against the appellant, Walters, will be reversed.

No. 19543 - REVERSED AND REMANDED.

No. 19337 - JUDGMENT REVERSED.

333 - 19346.

JOHN NELSON,

Appellee,

vs.

SAMUEL COHN, MICHAEL CAGNEY and
HANNAH COHN.

On Appeal of
MICHAEL CAGNEY,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

1931 A. 444

MR. PRESIDING JUSTICE MAINE
DELIVERED THE OPINION OF THE COURT.

This is an appeal, prosecuted by Michael Cagney, from a decree of the Circuit Court (enjoining a deed of trust in the nature of a mortgage. The decree was entered pro confesso. There is no appearance here by appellee.

The bill filed November 25, 1911, sets forth that Samuel Cohn and Hannah Cohn made and executed their certain promissory note, dated August 5, 1907, for \$1,300, payable to the order of themselves in five years after date, with interest at the rate of 5% per annum, payable semi-annually, as evidenced by ten interest coupon notes for \$32.50 each, payable respectively in 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months after date, as will appear by the principal note thereto attached, marked "Exhibit A". The bill also sets forth the execution by the same parties of their trust deed to secure the payment of said principal note and said interest coupon notes. The cause was referred to the master, who filed his report of proof and findings, but such report contains neither the original of said notes and trust deed nor copies thereof.

"Exhibit A", attached to the bill of complaint, and which purports to be a copy of the principal note, bears date August 5, 1909, being a date two years later than the date

of the note described in the bill. Foreclosure of the trust deed was sought and decreed for failure to pay the eighth interest coupon note due 48 months after date, which, if the date of the principal note is August 5, 1909, would be August 5, 1913, or long subsequent to the filing of the bill.

It may be shown by a defendant in a decree entered pro confesso that the decree is not justified by the averments of the bill; and where the bill predicated a right to relief on a note and mortgage, which, as exhibits are made a part thereof by reference, they control the allegations of the bill. Armstrong v. Douglas Park Bldg. Assn., 170 Ill., 486.

The proceedings in their entirety were most loosely and carelessly conducted.

The decree is reversed and the cause remanded.

REVERSED AND REMANDED.

345 - 19359.

WILLIAM T. FRIDMORE, Administrator
of the Estate of WILLIAM T. FRIDMORE,
Sr., Deceased,

Appellee,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC
RAILROAD COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

1921 A. 416

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

In this suit instituted in the Superior Court by William T. Fridmore, administrator of the estate of William T. Fridmore, Sr., deceased, against the Chicago, Rock Island & Pacific Railway Company to recover damages for the alleged wrongful death of plaintiff's intestate, a trial by jury resulted in a verdict and judgment against the defendant for \$4,500.

The declaration contains four counts. The first count charges negligence in the management and operation of a locomotive and cars belonging to appellant. The second count charges negligence in failing to sound a whistle or ring a bell when approaching a highway crossing, as required by statute. The third count charges the violation by appellant of Section 1978 of the Municipal Code of Chicago, limiting the speed of trains to ten miles an hour. The fourth count charges a violation by appellant of section 1981 of said Municipal Code requiring every locomotive, car or train of cars running in the night time on any railroad track in the city to have and keep while so running a brilliant and conspicuous light on the forward end of such locomotive, car or train of cars.

On the night of July 11, 1919, appellant had two cars of grain for delivery at the yards of the Pennsylvania

Railroad Company at Roby, Indiana, which delivery appellant desired to make on or before 12 o'clock midnight in order to avoid the payment of demurrage charges on said cars. Appellant procured permission from the Pennsylvania Company to haul said cars upon the tracks of that company from Rock Island Junction, where the tracks of the two companies intersected, to Roby. The distance between these two points is not disclosed by the record, but the evidence shows that the distance from River Branch Junction, a point a short distance east of Rock Island Junction, to Roby is two miles. Appellant's train crew, consisting of a conductor, locomotive engineer, fireman, and two flagmen, operating the train consisting of appellant's locomotive No. 115 and the said two cars of grain, left Rock Island Junction upon the east bound track of the Pennsylvania Company at 11:50 or 11:55 P. M. and arrived at Roby at 11:50 ^{P. M.} or 12:01 A. M. The tracks of the Pennsylvania Company between said points were at street grade. After crossing the Calumet river the tracks of the Pennsylvania Company running in a southeasterly direction intersect in the order named, Avenue H, Avenue K, Avenue L and Ewing avenue, all of which run north and south. Whether crossing flagmen were stationed at each of the avenues named does not clearly appear, but it does appear that at the railroad crossings at Avenue L and Ewing avenue crossing flagmen employed by the Pennsylvania Company were stationed at night. One, Rinnman, was stationed at the Avenue L crossing, and appellee's intestate was stationed at the Ewing avenue crossing near its intersection with 100th street. There was no eye witness of the occurrence which resulted in the death of appellee's intestate. The flagman's shanty which was occupied by the deceased was located east of Ewing avenue and south of the railroad tracks. Rinnman testified that at

about midnight on the night in question he was looking toward the crossing on Ewing avenue and saw a freight train approaching that crossing from the east; that he saw a lantern moving in a northerly direction from the flagman's shanty at said crossing and come to a stop at the center of said crossing at a point north of the west bound track; that after said freight train had cleared said crossing he saw the lantern moving back across the crossing toward the shanty; that about the time said west bound train cleared his crossing at Avenue L a locomotive and two cars passed him on the east bound track, and that he did not again see the lantern at the Ewing avenue crossing; that after the locomotive and two cars had passed east, two regularly scheduled trains also passed going east and that failing to then see any lantern at the Ewing avenue crossing his suspicions were aroused and he went to that crossing for the purpose of making an inspection; that he there saw the dead body of appellee's intestate. The body was first found between the rails of the east bound track about 250 feet east of the shanty. The evidence tends to show that the night was dark and that the streets in the immediate vicinity of the Ewing avenue crossing were but dimly lighted.

A clear preponderance of the evidence shows that the locomotive and two cars then being operated by the servants of appellant were running at a speed of from 35 to 50 miles an hour at the time they approached and crossed Ewing avenue; that the head light upon said locomotive was not then lighted, and that no bell was then rung and no whistle was then sounded. While appellee offered no evidence as to the habits of the deceased regarding care for his own safety, proof was made showing that he was industrious, sober, healthy, intelligent, in possession of all his faculties, and attentive and efficient in the performance of his duties as a crossing

flagman.

Upon the facts stated and the evidence introduced by appellee the case was properly submitted to the jury. The giving of the peremptory instruction tendered by appellant would have been a wholly unwarranted usurpation by the court of the functions of the jury. Indeed, a careful examination of the evidence persuades us that the jury could not have reasonably arrived at any conclusion other than that expressed in their verdict. The evidence shows not merely an absence of reasonable care by appellant in the management and operation of its train, but an absence of any care whatever in that regard.

Appellee offered in evidence certain train registers wherein, in the usual course of business, telegraph operators employed by the Pennsylvania Company registered the precise time of the arrival and departure of trains at the several points where such telegraph operators were stationed. In the instances in which the telegraph operators, who were called as witnesses, noted upon the register the arrival and departure of the train in question at the several points where such operators were employed, the registers were unquestionably properly admitted in evidence. The operator at River Branch Junction testified that upon receipt of a communication, either by telegraph or telephone, from the person whose duty it was to note the arrival and departure of trains at Rock Island Junction, that the train in question had left Rock Island Junction at 11:55 P. M., he, in the usual course of business, noted upon the register the departure of said train from Rock Island Junction as at the time so communicated to him. The operator or person whose duty it was to note the arrival and departure of trains at Rock Island Junction was not called as a witness, and it is isolated

by appellant that at the time noted on the register of the departure of the train in question from Rock Island Junction was noted by the operator at River Branch Junction upon hearsay, the notation upon the register in that particular was improperly admitted in evidence. Appellant in operating its train upon the tracks of the Pennsylvania Company became subject to the rules and regulations relating to the operation of trains which prevailed in the conduct of its business by the Pennsylvania Company, and if a train register so made in the ordinary course of business would have been competent evidence in an action against the Pennsylvania Company, it was competent evidence in the case at bar. But, whether properly or improperly admitted, its admission could not have been harmful to appellant. It is clearly established that the train in question left River Branch Junction at 11:58 P. M. The speed at which the train traveled between Rock Island Junction and River Branch Junction is not directly involved, because the Ewing avenue crossing, at or near which the deceased was struck and killed, is located some distance east of River Branch Junction, and the speed at which the train was running when it crossed Ewing Avenue is the only vital question upon that issue. If, as some of the train crew testified, the train left Rock Island Junction at 11:30 P. M., it occupied 8 minutes in running to River Branch Junction, whereas, if, as noted on the train register, it left Rock Island Junction at 11:36 P. M., it occupied only 3 minutes in running between those points. While the record does not disclose the distance between Rock Island Junction and River Branch Junction, it is clear from the facts and circumstances in evidence that the usual running time between said points is about two minutes.

A witness, Johnson, employed by the Pennsylvania Company as telegrapher at 103rd street, testified that he did

not hear the engine in question whistle as it approached that point. He was then asked to state whether or not in his opinion the engine whistled, and over objection, testified he did not think it did. While we think the form of the question was objectionable, it is closely akin to the approved line of inquiry of a witness, whether, if a bell had been rung or a whistle sounded he would have heard it. G. & A. R. R. Co. v. Dillon, 183 Ill., 870; Ill. Gen. R. R. Co. v. Slater, 130 Ill., 190; Barnett v. Chicago City Ry. Co., 167 Ill. App., 87.

Before the close of the evidence for appellee, counsel for appellee stated to the court, in substance, that there was then present the engineer of the train in question, whom he desired the court to call as a witness; that while he had subpoenaed the witness he did not want to vouch for him by making him his witness; that he was a hostile witness to appellee. The court struck the statement of counsel from the record and instructed the jury to disregard it, stating there was no evidence to show whether the witness was hostile or otherwise. Over the objection of appellant the court then called the witness and interrogated him respecting the movements of the train upon the occasion in question. While the line of inquiry adopted by the court was neutral in its character, frequent objections were interposed by counsel for both parties to specific questions propounded to the witness. No showing was made by appellee which justified the court in calling the witness for examination by the court, but no harm resulted to appellant, because the witness was subsequently called by counsel for appellant when upon his direct and cross examination he covered the same ground which had been covered upon his examination by the court.

The fifth and sixth instructions given at the instance of appellee, while somewhat ineptly phrased, are not

open to serious criticism. The sixth instruction referred to an ordinance of the City of Chicago which was offered in evidence by appellee limiting the rate of speed of railroad trains running within the City limits. It is said by appellant that the ordinance which was introduced by appellee was not in effect at the time in question, but that the same had been superseded by other subsequently adopted ordinances relating to the speed of trains within the city limits, which ordinances were offered in evidence by appellant and improperly excluded by the court. The ordinances offered by appellant were only to become effective upon the performance of conditions not existing at the time such ordinances were adopted, and it is manifest that such ordinances were not properly admissible in evidence, except upon proof of performance of such conditions. No such proof was made.

The seventh instruction given at the instance of appellee does not, as contended by appellant, ignore the requirement that the deceased should at the time in question have been in the exercise of due care for his own safety.

The instruction is inartificially framed, but it is not seriously objectionable.

There is no merit in appellant's contention that the deceased by reason of his employment as a crossing flagman did not come within the class of persons entitled to protection under the provisions of statutes and ordinances relating to the speed of trains, headlights upon locomotives and warning signals. B. & O. R. W. Ry. Co. v. Almon, 170 Ill., 471; E. St. Louis Ry. Co. v. Hermann, 170 Ill., 538; Ill. Cen. R. R. Co. v. Gilbert, 157 Ill., 354; T. P. & W. Ry. Co. v. Harrell, 115 Ill. App., 386; Same v. Same, 250 Ill., 9; Cook v. C. R. I. & P. Ry. Co., 153 Ill. App., 506.

While the ninth, tenth and eleventh instructions given at the instance of appellee will not successfully withstand critical analysis, and are in some particulars wholly indefensible, we are clearly of opinion that under the facts and circumstances in evidence in this case, the jury were not influenced thereby to return a verdict which they could not have returned in the absence of such instructions, or if such instructions had contained accurate statements of the law applicable to the case.

Isolated and fragmentary expressions found in judicial opinions may very infrequently be safely employed as vehicles for accurate statements as to the law of a case, to be embodied in instructions.

Notwithstanding the errors in the record, we are satisfied that the verdict and judgment stand for substantial justice, and that the judgment should be, and accordingly is, therefore, affirmed.

JUDGMENT AFFIRMED.

19 - 19384.

ALBERT G. McLEAN,

Plaintiff in Error,

vs.

THOMAS M. HUNTER, Bailiff of the
Municipal Court of Chicago,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1921 A. 450

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

On April 15, 1911, the Consolidated Agency Company, a corporation, recovered a judgment in the Municipal Court against Albert G. McLean for \$62.20, and on April 24th, following, an execution issued on said judgment was served on said McLean by the Bailiff of the Municipal Court, who then notified McLean that he must, within ten days thereafter, file a schedule of his property, if he desired to avail himself of the benefit of the exemption laws. On May 1st, following, McLean executed what purported to be a schedule of his personal property, wherein he set forth that he was the head of a family consisting of a wife and one child, and resided with the same, and stated that he desired to avail himself of the benefit of the act relating to exemptions. The property scheduled was described therein, as follows: "A small stock of groceries and meats not to exceed One Hundred Dollars (\$100.00); one suit of clothes. Cash on hand, None; Debts due and owing me, None," On May 2nd following, the attorney for McLean went to the office of the bailiff of the Municipal Court, and handed the schedule to a deputy bailiff at the window there, and told him that he (the attorney) had a schedule here. The deputy bailiff took the schedule, examined it, folded it up and stamped it, "Received - First District. Thomas M. Hunter, Bailiff of the Municipal Court of Chicago, this 2nd day of May, A. D. 1911."

After the filing of the said schedule in the office of the bailiff, the attorney for the judgment creditor was notified thereof, and he then informed the chief deputy bailiff that the manner of the description of the property in the schedule rendered the same illegal and void for uncertainty. Upon the execution by the judgment creditor of an indemnifying bond, the bailiff levied the execution upon certain specifically described property, consisting of more than one hundred separate items of property, such as are ordinarily included in a stock of groceries and meats, and being the same property which was claimed by McLean to be exempt. McLean then procured a writ of replevin to be issued out of the Municipal Court for the recovery of said property from the bailiff and said property was taken under said writ by the sheriff and returned to McLean.

Upon the trial of the replevin suit in the Municipal Court, a jury having been waived, the court found the issues in favor of the defendant, Thomas M. Hunter, bailiff, and judgment was entered upon such finding for the return of said property to said defendant and against the plaintiff, McLean for costs. This writ of error is prosecuted to reverse such judgment.

The questions involved are, first, whether the schedule as filed by plaintiff in error is sufficient to entitle him to claim the property therein described or any portion thereof as exempt; and, second, whether the mere act of the bailiff of the Municipal Court in receiving and filing said schedule, without objection as to its sufficiency, operated to estop him from contesting its sufficiency, or operated as a waiver of any informality therein.

Section 14, Chap. 52, of the Act relating to the exemption of personal property by act approved June 24, 1895,

is, in part, as follows:

"Whenever any debtor against whom an execution * * * has been issued, desires to avail himself of the benefit of this act, he shall within ten days after a copy of the execution * * * is served upon him, such copy of the execution to have endorsed thereon a notice signed by the officer, notifying the debtor that he must file a schedule of his property within ten days from the service thereof, whereupon the debtor shall make a schedule of all his personal property of every kind and character, including money on hand and debts due and owing to the debtor, and shall deliver the same to the officer having the execution * * * or file the same with the justice or in the court where the writ is issued, * * * and any property owned by the debtor and not included in such schedule shall not be exempt as aforesaid, and thereupon the officer having the execution * * * shall summon three householders, who after being duly sworn to fairly and impartially appraise the property of the debtor, shall fix a fair valuation upon each article contained in such schedule, and the debtor shall then select from such schedule the articles he or she may desire to retain, the aggregate value of which shall not exceed the amount exempted, and to which he or she may be entitled, and deliver the remainder to the officer having the writ; and the officer having such writ is hereby authorized to administer the oaths required herein of the debtor and appraisers."

The prior act of May 24, 1877, provided that the schedule should be delivered to the officer having the execution.

The oath of plaintiff in error to the schedule here involved was not administered by the officer having the writ of execution.

While exemption statutes are to be liberally construed to protect the debtor, courts, in seeking to attain that end, are not justified in distorting the language of the statute and thus placing upon it a construction not within the legislative intent. In arriving at a proper construction of the statute consideration should be given not only to the purpose sought to be served, but to the means provided for the accomplishment of such purpose. The statute provides that the debtor "shall make a schedule of every kind and character"; that "the appraisers shall fix a fair valuation upon each article contained in such schedule, and the debtor

shall then select from such schedule the articles he or she shall desire to retain * * * and deliver the remainder to the officer having the writ."

Manifestly, it is contemplated that the articles constituting the property scheduled by the judgment debtor shall be set forth separately, so that they may be appraised as scheduled, and so that the judgment debtor may select such of the articles so scheduled as he may desire to retain. The statute does not authorize the judgment debtor to fix the value of the property scheduled by him, and he cannot by arbitrarily assuming to fix the value of such property scheduled in gross escape his duty to comply with the statute, where the valuation so fixed by him is within the amount of the exemptions available to him. The fixing of the fair valuation of each article scheduled is a duty imposed by the statute upon the appraisers.

Appraisers acting upon the schedule here involved could only fix the fair valuation of the stock of groceries and meats in gross. If such valuation exceeded the amount plaintiff in error was entitled to claim as exempt, any selection and retention by him of any portion of said stock would not be referable to his schedule, as is contemplated by the statute.

In Moffett v. Sheehy, 52 Ill. App., 376, it was said: "The schedule should list separately each article of a distinct kind, or of a distinct quality, grade or description of the same kind, to enable appraisers the more readily to fix the value of each article contained in it." This language was quoted with approval in McClellan v. Powell, 109 Ill. App., 222. In the McClellan case, the schedule filed by the judgment debtor described the property thus: "Personal property, household and kitchen furniture, tobacco and cigars." It was held that the schedule was

clearly too general in the description of the silverware, tobacco and cigars.

The holding in these cases meets with our approval, and we conclude that the schedule in question did not comply with the requirements of the statute.

In Pensoneau v. Masserang, 8 Ill. App., 298, it was said: "He" (the constable) "made no objection to the form or substance of the schedule. He cannot now say that the schedule was not a compliance with the law." This statement of the law is too general in its scope, and was not necessary to the decision of the case before the court. There, as in Langston v. Murphy, 31 Ill. App., 188, the conduct of the constable having the execution, in refusing to accept or act upon the schedule delivered to him, was arbitrary, oppressive and in breach of good faith. Of course, in such a case the judgment debtor will not be deprived of his right to avail himself of his exemptions.

There is no pretense that the bailiff having the execution in the case at bar, was chargeable with any such conduct.

Under the existing statute the plaintiff in error might properly have filed his schedule with the clerk of the Municipal Court, and if the schedule had been so filed, could it be successfully contended that the mere act of the clerk in receiving and filing the schedule without objection, operated to estop the judgment creditor from asserting its insufficiency. Certainly not.

The reference in McClellan v. Powell, 109 Ill. App., 222, to the rule announced in Pensoneau v. Masserang, supra, must be considered merely as in approval of the application of said rule in a like case upon the facts.

The judgment of the Municipal Court was right and is affirmed.

JUDGMENT AFFIRMED.

17437
375 - 19400.

In re Estate of ANNA REED, deceased,

~~claim of~~ ANNIE JOHNSON,
Appellee,

vs.

~~On Appeal of~~
JOHN F. BEVINE, as administrator ad litem
of the Estate of ANNA REED, deceased,
Appellant.

APPEAL
FROM
CIRCUIT COURT,
COOK COUNTY.

192 I.A. 453

HON. PRESIDING JUSTICE BAUER
DELIVERED THE OPINION OF THE COURT.

Annie Johnson filed her claim in the Probate Court of Cook County against the estate of Anna Reed, deceased, for \$3,000, agreed to be bequeathed to claimant by said deceased in her last will and testament. Upon a hearing in the Probate Court said claim was disallowed and claimant prosecuted her appeal from such judgment of disallowance to the Circuit Court, where, in a trial by jury, wherein a verdict was directed for claimant for the full amount of her claim, judgment was entered against said estate for \$3,000 and costs to be paid in due course of administration. On Appeal from said judgment to this court the judgment was reversed and the cause remanded upon the ground that the issues of fact involved should have been submitted to the jury. In re Estate of Anna Reed, deceased, 186 Ill. App., 341. On the reinstatement of the cause in the Circuit Court a trial by jury resulted in a verdict in favor of the claimant for the full amount of her claim, upon which verdict judgment was entered against said estate for \$3,000 and costs to be paid in due course of administration with an award of execution. This appeal is prosecuted by the administrator of the estate of said deceased to reverse said judgment.

The main contention of appellant is that the evidence is insufficient to support the verdict and judgment.

The law of the case was stated by this court upon the former appeal as follows:

"To entitle appellee to recover in this case, it was necessary for her to establish by proper evidence that between herself and the deceased there existed a contract by which the deceased, in consideration of some act or thing to be performed by appellee, agreed to make the particular bequest claimed, and that appellee had performed her part of the contract. Wallace v. Bauplaya, 103 Ill., 400.

"When such a contract is made the basis of an action, the evidence in support of it should be looked upon with great jealousy, and weighed in the most scrupulous manner, and the character, conduct and testimony of the witnesses should be such as to inspire confidence that they are telling the truth. Such a contract can only be enforced when it is clearly proven by direct and positive testimony, and when the terms of the contract are definite and certain. The most stringent doctrines of the court should be applied in such cases. Wallace v. Bauplaya, 103 Ill., 400; Ross v. Evans, 113 Ill., 100."

The testimony of all the several witnesses, except Mrs. C. M. Nelson, called by appellee to substantiate her claim on the last trial is in substantial accord with the testimony of the same witnesses upon the former trial, which testimony is quite fully set forth in the former opinion of this court. Mrs. Nelson was not called as a witness upon the last trial.

It is uncontroverted that appellee lived with and at the home of Anna Reed for about 20 years prior to the death of the latter in April, 1907; that during that time appellee did the ordinary housework, washing and sewing, cared for and nursed Mrs. Reed, assisted her in her financial affairs, rented her apartments and collected the rents therefor, and was accepted by and acted in the capacity of a companion to Mrs. Reed; that appellee and Mrs. Reed alone constituted the household; that during a portion or all of said time, except the last ten months of Mrs. Reed's life she paid appellee wages at the rate of \$30 per month, and

for the last named period appellee's claim for wages amounting to \$2000 was allowed by the Probate Court.

Mary B. Olson, whose evidence was taken by deposition, testified that in December, 1903 or 1904, upon an occasion when Mrs. Reed was scolding appellee, the witness remarked that she must not scold appellee, whereupon Mrs. Reed said, "I have agreed to give her, when I die, either three or four thousand dollars, if she will stay with me during my lifetime, so don't worry about Annie." Referring to the same occasion she testified on cross examination as follows: "She was scolding Annie. I said, 'Don't scold Annie'. She said, 'Annie is my best friend, and when I die I intend to, I agreed to leave her three or four thousand dollars, the agreement between Annie and I which I have made,' were her exact words." The same witness testified that upon another occasion when appellee was in the kitchen and witness and her sister were talking to Mrs. Reed, the latter said, "that she had agreed with Annie that if she agreed to stay during her lifetime, to give her three or four thousand dollars, if she stayed with her during her lifetime." The same witness also testified that upon a subsequent occasion when a Mrs. Gridley, Mrs. Reed and herself were present, Mrs. Reed said, "she had agreed to give Annie Johnson three or four thousand dollars, if she stayed with her during her lifetime."

It is evident from the testimony of this witness that in relating the statements made by Mrs. Reed she did not mean to be understood as testifying that Mrs. Reed had stated that she had agreed to give appellee an uncertain amount, as \$3,000 or \$4,000, but rather that Mrs. Reed had stated an amount certain, which was either \$3,000 or \$4,000, and that the recollection of the witness as to the precise amount stated by Mrs. Reed was uncertain.

Rosa Jennings testified that she had known Mrs. Reed intimately for about thirty years, and had lived near her for eight or ten years; that she had known appellee for 18 or 20 years; that upon one occasion Mrs. Reed said that appellee had been so faithful to her, if appellee would stay with her, she would give appellee \$3,000; that on a subsequent occasion Mrs. Reed told her that if appellee would agree to stay with her until she passed away, she would leave appellee \$3,000, that she had decided in her will to leave appellee that amount; that she frequently had other conversations with Mrs. Reed respecting the same subject matter; that the last conversation above specifically referred to was the only one in which Mrs. Reed mentioned the amount she was going to give appellee.

Etta Foster testified that she had frequent conversations with Mrs. Reed about appellee, and referring to an occasion about 2 months prior to the death of Mrs. Reed witness testified that Mrs. Reed said: "Annie has been so faithful to me that the wages I paid her will not compensate what she has done for me, I will leave her \$3,000, if she remains with me to the end." This witness also testified that referring to her relatives Mrs. Reed said she didn't care a snap of her finger for her relatives; that she had not seen most of them for years; that appellee was present upon that occasion and that Mrs. Reed pointed her finger at appellee and said: "She has been faithful to me, and I am going to reward her and going to compensate her for all she has done for me."

Clara Beland testified that upon an occasion about 6 months before Mrs. Reed's death, when appellee was present Mrs. Reed said Annie was always a very faithful servant, that she had served her for 23 or 25 years, not only had done her

work, but collected her rents, took care of the renting of the apartments, and cleaned them, and took charge of the renting of them, and because she was so faithful, she had made the agreement with Annie that if Annie would stay with her until death, she would leave her \$3,000, that she had already made her will to that effect. She further testified that Mrs. Reed had spoken to her more than once about leaving \$3,000 to appellee.

Appellant insists that the formal claim originally filed by appellee in the Probate Court, and which was subsequently dismissed by appellee, was so utterly inconsistent with the claim subsequently filed by appellee and upon which the hearing was had as to suggest that appellee had shifted her position with reference to the basis of her claim, and thus discredited the integrity of the claim sued upon. The claim originally filed by appellee was formulated as follows: "To services rendered by claimant to Annie Reed to be compensated for by legacy to claimant for.....\$3,000.00." While this claim, as thus formulated, did not in terms refer to an agreement or contract between the parties, it almost necessarily implied the existence of a contract or agreement, as the basis of the claim. The circumstance mentioned is not of sufficient significance to affect the merits of the case.

The jury were entitled to know all the facts and circumstances concerning the existing relations between the parties, their disposition and conduct toward each other, and the character and extent of the services performed by appellee, not for the purpose of authorizing a recovery by appellee on the basis of a quantum meruit, as appellant intimates, but for the purpose of enabling the jury to weigh the testimony of the witnesses, in the light of all such facts and circumstances. We venture to say that if the parties had been strangers, or

unfriendly, or if appellee had performed no services whatever for Mrs. Reed appellant would have been quick to avail himself of the evidence of such facts for the purpose of affecting the credibility of the witnesses called by appellee. The action of the court in excluding evidence of some facts and circumstances sought to be adduced by appellee was more favorable to appellant than was justified.

The presumptory instructions tendered by appellant were properly refused. The question of fact involved was not determinable by the court and was properly submitted to the jury.

The instructions considered as a series state the law applicable to the case with substantial accuracy. While an oral contract such as is here alleged and involved can only be enforced when it is clearly and satisfactorily proven as to all of its terms, it is only necessary for a party asserting the existence of such a contract to make such proof by a preponderance of the evidence.

Notwithstanding the testimony of some of the witnesses is insufficient in itself to establish the oral agreement relied upon by appellee, there is testimony of other witnesses which, if true, warranted the jury in finding that Mrs. Reed had agreed with appellee that, if the latter would remain with her during her lifetime, she would bequeath to appellee \$3000. Appellee was not a competent witness in her own behalf, but it is clearly established that she lived with Mrs. Reed, for a period of 20 years and during the latter's lifetime, and that during all of that period performed services for which the wages received by her were inadequate. Statements made by Mrs. Reed to the effect that she had agreed to give appellee \$3,000, because the latter had been and was so faithful, are not to be imputed merely to a sympathetic and benevolent disposition on her part toward appellee, but

are, as well, indicative of her recognition and appreciation of the services rendered by appellee, and of the comfort afforded by her companionship. Statements by Mrs. Reed as to the existence of such an agreement with appellee, are shown to have been made by her in the presence of appellee, and the assent of appellee thereto may not improperly be implied.

In Willis v. Garner, 333 Ill., 574, where the court had under consideration a somewhat similar oral agreement with reference to real estate, it was said:

"While an oral contract of this kind, and all of its terms, must be clearly and satisfactorily proven, we think the weight of authority is that such a contract may be proved by other than direct evidence; that where the facts, including the acts of the parties, raise a convincing implication that the contract was actually made, and satisfy the court that its terms and provisions are sufficient to justify its enforcement, it should be upheld. (35 Cyc., 330, and cases cited.) In Allison v. Dunn, 107 Pa. 30, it was held that where the contracting parties were not parent and child such a contract might be proved by the acts and declarations of the parties, either together or separately. See, also, Loner v. Loner, 86 Me. 662; Wright v. Wright, 90 Mich. 170; Kearns v. Halsey, 37 Utah, 7; Deviation v. Deviation, (Iowa) 110 N. W. Rep. 240. Fairly construed, we think the decisions in this State uphold this rule."

We are not persuaded that the verdict of the jury is not warranted by the evidence.

The award of an execution against the administrator was improper and resulted from a mispleading of the clerk. The judgment should have been against the administrator to be paid in due course of administration. Ball v. Harrison, 31 Ill., 487; Alben v. Wachter, 74 Ill., 173.

As no error intervened prior to the entry of final judgment in the case, a venue facias de novo, will not be awarded, but the judgment will be reversed and the cause remanded, with directions to the Circuit Court to enter a proper judgment, as above indicated, upon the verdict. McKul-
in v. Rasch, 134 Ill., 46; Gage v. The People, 153 Ill., 59; Lyons v. Sampson, 182 Ill. App., 342.

89 - 19471.

T. C. VANCE, C. H. HASTE and
MRS. GEORGE H. WILLIAMS, a
Co-partnership,

Plaintiffs in Error,

vs.

ISABEL MACLEAN,

Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

JUN. PRESIDING JUSTICE BAUM
DELIVERED THE OPINION OF THE COURT.

1921.A. 455

This is a suit by plaintiffs in error against defendant in error to recover \$30, alleged to be due for office rent for February and March, 1912. Defendant in error filed her claim of set-off. A trial by jury in the Municipal Court resulted in a verdict and judgment in favor of defendant in error upon her claim of set-off for \$34.03.

The suit is predicated on the claim of plaintiffs in error that defendant in error agreed to pay to them \$15 per month for a term beginning May 1, 1911, and ending April 30, 1912, as rent for space in certain offices of which plaintiffs in error were the leasees; that defendant in error had refused and failed to make payments for the months of February and March, 1912. No claim is made for the months of April, 1912, for the reason that defendant in error vacated the premises in the month of March at the request of plaintiffs in error. Defendant in error's set-off is based upon the claim that the obligation to pay \$15 per month assumed by herself and others using space in the offices was not absolute, but merely contingent; that all of the persons, including plaintiffs in error, who occupied space in said offices, had entered into an agreement, whereby each of said persons should pay \$15 per month to plaintiff in error, Vance, and that the aggregate of the amounts thus paid to him should be applied

by him in payment of the rent and certain incidental office expenses, such as telephones and laundry service, and that in the event the aggregate amount received by Vance should exceed the amount paid for rental and expenses, the surplus should be divided pro rata among the several persons so contributing \$15 per month; that defendant in error had made nine payments of \$15 each and that the total amount of the payments so made by her was in excess of her pro rata share of rent and office expenses actually incurred and paid for the eleven months during which she occupied space in the offices; that defendant in error's pro rata share of such excess was about \$50. As heretofore stated, the verdict and judgment in her favor upon her claim of set-off was for \$34.03.

The evidence bearing upon the questions of fact involved is close and conflicting, and we are not disposed to hold that the verdict should be set aside as being contrary to the manifest weight of such evidence.

Apart from the contention that the verdict and judgment are not supported by the evidence, the main insistence of plaintiffs in error relates to the question of procedure. It is insisted that the trial court improperly refused to strike defendant in error's affidavit of defense from the files, upon the ground that it did not state facts which constituted a defense to the action, but merely stated conclusions. The affidavit of defense is not defective for the reason urged. An agreement was set up in the affidavit of defense which, if true, involved an inquiry in the nature of an accounting between the parties, which, if it arises on a back account, may properly be heard and determined by the Municipal Court in an action of the fourth class.

Section 17 of an Act in regard to the action of

account provides that justices of the peace shall have jurisdiction in all actions on book accounts where the amount of the balance owing to the plaintiff shall not exceed \$200, etc. R. S. 1915, p. 6.

Subdivision (c) of the 4th paragraph of section 3 of the Municipal Court Act provides that the jurisdiction of the Municipal Court in cases of the fourth class shall include "all actions and proceedings of which justices of the peace are now given jurisdiction by law and which are not otherwise provided for in this act in which class of actions and proceedings the Municipal Court shall have jurisdiction where the amount sought to be recovered does not exceed one thousand dollars (\$1,000)." A book account kept by or on behalf of plaintiffs in error was relied upon by them to establish their claim, and the case so made may not improperly be held to be an action on book account.

Plaintiffs in error having first broken the agreement with defendant in error, by compelling her to vacate the premises at the end of the eleventh month, are in no position to demand a forfeiture of her rights under the agreement because she failed to pay rental for the twelfth month. In this view of the case, the objection urged to the instructions is untenable.

The judgment is affirmed.

JUDGMENT AFFIRMED.

211 - 19801.

WILLIAM F. SCHOFIELD,
Plaintiff in Error,

vs.

WILLIAM H. ZINN and FRANK G. WARDEN,
Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

1921 A. 456

This is a suit in attachment instituted in the Municipal Court by plaintiff in error against defendant in error, William H. Zinn, wherein Frank G. Warden was summoned as garnishee, to recover \$895, alleged to be due to plaintiff in error as a broker's commission for procuring the sale of certain shares of stock by said Zinn to said Warden. A trial by the court resulted in a finding in favor of defendant in error Zinn, and a further finding that the garnishee was indebted to Zinn in the sum of \$10,105.00. Judgment was entered against plaintiff in error in bar of his action and the garnishee was discharged.

The only assignment of error which is argued and which it is necessary to consider, is, that the finding and judgment are contrary to the law and the evidence.

In April, 1907, Meyers, Stubbs and Kean were the lessors of the Hotel Alabama at Anniston, Alabama, under a lease expiring July 1, 1909, and were also the owners of the furniture, furnishings and stock of goods in the hotel. The hotel property was owned by the Anniston Hotel Co., a corporation, of which most of the shares of stock were owned by Zinn. Plaintiff in error was then and had been for many years a hotel broker in Chicago, and was employed by Stubbs and Kean to sell their lease-hold interest in said hotel, together with the furniture, furnishings and stock contained therein. Plaintiff in error presented the proposition to

Warden, who was then the owner and lessee of several hotel properties, and upon the strength of the representations made by plaintiff in error, Warden was induced to go to Anniston for the purpose of investigating the same. Upon investigation Warden became favorably impressed with the proposition, save in the respect that he could obtain no assurance that he would be able to secure an extension of the lease for a period of five years, or for some like period, which would justify the required investment. Zinn was then traveling abroad and was not expected to return to Anniston until June or July following. Zinn's address was procured, and upon the return of Warden to Chicago he wrote to Zinn requesting an interview with the latter at Chicago. Upon receipt of the letter at Seattle or Vancouver, Zinn arranged to stop in Chicago, where he arrived in June. In the course of several conferences then had, in the first instance between Zinn and Warden, and later between plaintiff in error and Zinn, the latter was informed of Warden's desire to buy out Stubbs and Kean, if he could secure an extension of the lease, and Zinn expressed his disinclination to extend or procure an extension of the lease unless Warden would purchase the share of stock, which Zinn then owned in the corporation. During these interviews plaintiff in error directed his efforts in an attempt to induce Zinn to grant an extension of the lease as demanded by Warden. The negotiations then had between the parties did not result in any agreement. Early in July, following, Warden, accompanied by plaintiff in error, again went to Anniston where the parties resumed negotiations along the same lines, and on July 8th these negotiations resulted in the purchase by Warden from Stubbs and Kean of the furniture, furnishings and stock of goods then in the hotel for \$30,000, and the

execution by Zinn and Warden of an option contract for the sale to the latter of the shares of stock owned by Zinn in the corporation.

By the terms of this contract Zinn agreed to sell and deliver to Warden, at any time after 30 days from demand, 231 shares of stock of the corporation for \$125 per share, aggregating \$28,875.00. The contract recited the payment by Warden of \$5,000 upon its execution, and provides that said amount shall be credited on the aggregate amount, if the remainder is paid prior to March 1, 1908, and if said remainder is not so paid, then said \$5,000 shall be regarded as liquidated damages and forfeited to Zinn, and the contract shall cease and determine; that Zinn shall have the option to deliver 30, or any less number, additional shares at the same price, to be paid for by Warden on or before March 1, 1908. The contract further provides that upon the payment to him of the full purchase price of the shares of stock, and of certain notes of the corporation aggregating \$10,000 with interest, and when said corporation shall have discharged a certain mortgage executed by it for \$40,000, Zinn would loan to said corporation \$40,000 for five years, secured by a mortgage on the property and effects of said corporation; that said Warden shall pay for said shares of stock on or before March 1, 1908, or on failure so to do shall forfeit to said Zinn, as liquidated damages, the \$5,000 above mentioned; that said Warden shall notify said Zinn on or before January 1, 1908, if there is to be a failure on his part to take and pay for said shares of stock; that Zinn shall obtain the written consent of the corporation for the transfer of the lease from Stubbs and Keen to Warden, and shall also obtain the like consent of said corporation that no other lease be made without the consent of Warden, unless

the latter shall give notice as above stated that the terms of the contract are not to be carried out.

On July 11, 1907, three days after the execution of said option contract by Zinn and Warden, Zinn gave to plaintiff in error a check for \$125, and also then executed the following agreement:

"In consideration of your services as broker in negotiating the sale of my stock in the Anniston Hotel Company, Anniston, Ala., I hereby agree to pay you a commission of 5% on the amount of money derived from said sale of 241 to 244 shares of stock of said Company. It is understood that the aforesaid shares are sold at the rate of \$125 per share, and that \$125 has already been paid on said commission, balance to be paid when the purchase price is complete. Anniston, Ala.

July 11-1907.

(Signed) WM. H. ZINN."

This is the agreement upon which this suit is brought. Following the purchase by Warden on July 8, 1907, of the furniture, furnishings and stock of goods in the hotel, and the execution of the said option contract for the purchase by him of said shares of stock of the corporation, Warden went into possession of the hotel. On December 11, 1907, Warden notified Zinn in writing that he declined to take the shares of stock mentioned in the option agreement of July 8, 1907, and that he would forfeit to Zinn the \$5,000 paid thereon, as liquidated damages for his (Warden's) failure to take said stock. This action on the part of Warden appears to have been induced by the fact that, following the option contract of July 8, 1907, the City of Anniston had become dry territory, and his consequent belief that the purchase by him of a controlling interest in the corporation on the terms agreed upon would be a losing venture from a business standpoint.

Warden continued in possession of the hotel property until the expiration of the then existing lease on July 1, 1908, when he was granted an extension of the lease by the corporation for another year, and continued to occupy the

hotel property under said extension, until July 1, 1909, and thereafter until October, 1909, as a tenant at will or by sufferance. Negotiations were then entered upon at Anniston between Zinn and Warden with a view to a settlement of their existing relations. Warden offered to sell the furniture, furnishings, etc., in the hotel to Zinn, but the price at which the latter offered to purchase the same was deemed inadequate by Warden. Zinn also then proposed to sell his shares of stock in the corporation to Warden, but the parties were unable to agree upon a price. During the pendency of these negotiations each one of the parties sought to out-wit the other in an effort to secure a substantial advantage. Warden threatened to lease another hotel property in the city of Anniston and to move his hotel furniture and furnishings into such other hotel, and by way of a counter movement Zinn purchased some second-hand hotel furniture and furnishings with a view to re-opening the hotel in question, when Warden vacated the same. Finally, through the persuasive influence of some citizens of Anniston, acting with a view to securing a continuance of the management of said hotel by Warden, each of the parties was led to withdraw or modify some of his demands, and thereupon, on October 13, 1909, the parties entered into an agreement, in substance, as follows:

"This contract made and entered into by and between Wm. H. Zinn, of Anniston, Alabama, and Frank C. Warden, of Newark, Ohio, Witnesseth;

"That, whereas, the said Zinn has bargained and sold to said Warden 233 shares of the capital stock of the Anniston Hotel Company for \$125 per share, aggregating \$29,125.00 to be paid for as follows: \$5,000 in cash on the execution of this contract, \$10,000 on or before January 1, 1911, and \$14,125.00 on or before January 1, 1912, the deferred payments to be evidenced by the promissory notes of the said Warden bearing even date herewith and bearing interest from date at the rate of 6% per annum. On the payment of the note for \$14,125.00, last falling due, the said Zinn agrees to give a credit of \$5,000.00, with interest thereon from this date at the rate of 6% per annum, being the amount heretofore paid by the said Warden for an option on stock of said Zinn in said Hotel Company.

"It is further agreed that the certificates for said 289 shares of stock shall be deposited in the Anniston National Bank, to be delivered to the said Warden on the full payment of said promissory notes, as above described, but it is further agreed that said certificates of stock shall remain in the name of the present stockholders, as they appear on the stock book of said Hotel Company, with the right to be voted by them at all meetings of the stockholders until full payment for the same has been made by the said Warden.

"It is further agreed that there has been issued and sold only 368 shares of capital stock of said Hotel Company, and 80 shares of the stock of said company has been issued and deposited as collateral security for a loan heretofore made, and said Zinn hereby agrees on his part to vote the said 289 shares of said stock so sold to said Warden against any proposition to issue or sell any other stock until the said stock herein described has been paid for in full by the said Warden.

"It is the desire of the said Warden that the said Zinn shall remain President and General Manager of said Anniston Hotel Company until said stock has been paid for."

This final agreement which has since been acted upon by the parties was entered into at Anniston and plaintiff in error was neither present at nor participated in the negotiations which terminated in the making of said agreement.

Without doubt, if the option contract of July 8, 1907, had been finally consummated, plaintiff in error would have been entitled to a commission of 2½% on the amount realized by Zinn from the sale of the shares of stock to Warden. The argument advanced by counsel for defendant in error, Zinn, in an attempt to show that plaintiff in error was not instrumental in procuring the execution of the option contract of July 8, 1907, is wholly ineffectual in the face of the written agreement signed by Zinn on July 11, 1907, wherein he specifically acknowledges the services of plaintiff in error as having been the procuring cause of the sale of the shares of stock to Warden.

Whether the commission agreement of July 11, 1907, is to be limited to the option contract of July 8, 1907, if and when effectuated, or whether it may properly be held to include the contract of October 13, 1906, must be determined upon a consideration of all the facts and circumstances

in evidence.

There is nothing in the evidence tending to impeach the good faith of Warden in notifying Zinn of his election not to carry out the agreement of July 8, 1907, and to forfeit the \$5,000 paid thereon as liquidated damages. While plaintiff in error may thereafter have sought to induce Warden to withdraw his refusal to comply with the option agreement, it is reasonably clear from the evidence that as early as Feb. 3, 1908, plaintiff in error had come to the conclusion that further efforts by him to induce Warden to comply with said agreement or to purchase the shares of stock upon any other terms satisfactory to Zinn would be unavailing. There was correspondence between plaintiff in error and Zinn embracing a period as late as June 25, 1908, relative to the procuring by plaintiff in error of a purchaser for the shares of stock owned by Zinn, but all such correspondence subsequent to February, 1908, utterly ignores the probability of Warden becoming such purchaser, and relates to efforts made and to be made by plaintiff in error to induce some person or persons other than Warden to purchase said shares of stock.

Clearly, the commission agreement of July 11, 1907, is referable solely to the option contract of July 8th preceding, and in the absence of any evidence tending to show want of good faith on the part of Zinn or Warden in failing to consummate said option contract, for the purpose of depriving plaintiff in error of his commission, the latter cannot predicate a right to recover commissions under said agreement of July 11th, merely upon the ground that at some subsequent time the same parties actually entered into and consummated a contract for the purchase and sale of a portion of the same shares of stock mentioned in the option contract

of July 8, 1907. The purchase and sale of the stock was actually consummated under the terms of a contract made October 13, 1908, two years and three months after the option contract of July 8, 1907, and more than 18 months after the latter contract had, in good faith, been forfeited and annulled. The right of plaintiff in error to a commission upon the sale of the stock under the contract of October 13, 1908, is to be ascertained and determined, not by the commission agreement of July 11, 1907, but upon an inquiry as to whether or not he was the efficient cause of the sale evidenced by the contract of October 13, 1908. This was a question of fact for the trial court and we perceive no reason for disturbing the finding of the court upon that issue.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

295 - 19693.

ATLAS FLOOR COMPANY, a corporation,
Defendant in Error,

vs.

JACOB L. KESNER,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

1921 A. 458

In a suit instituted in the Municipal Court by defendant in error against plaintiff in error to recover \$315, a balance claimed to be due for labor performed and material furnished in laying a combination floor in a building owned by plaintiff in error, a trial by jury resulted in a verdict and judgment against plaintiff in error for the amount of the claim.

The order which constitutes the contract between the parties is as follows:

Please enter our order for
the following:

"Chicago 2-10 1912

To Atlas Floor Co.
Feb. 12 1912

To be done at once

To entire 1st fl store
118 S. Michigan Blvd.

Furnish lay composition floor, color Tennessee Gray Marble
guarantee uniform color & surface ascertain that old wooden
floor is satisfactory in every way to lay yours on, guarantee
five years absolutely against cracking, bulging or disintegrat-
ing for (5) five years. Finished floor to have polished
surface like sample. Cost to us (\$630.00) six hundred thirty
dollars.

Payment 50% - 30 days

50% when floor is perfectly satisfactory to us &

Geo. Nagle c/o Truax.

J. L. Kesner

By Isa W. Kahn."

The premises had been leased by plaintiff in error to the Truax Medical Supply Co., and George Nagle mentioned in last clause of the contract, was employed by said company to superintend the equipment of the premises for its business.

The floor was laid by defendant in error and one-half of the cost price was paid to it on March 27, 1912.

The evidence bearing upon the question whether or not the floor as laid by defendant in error complied with the specific requirements of the contract is in irreconcilable conflict, but it appears that the floor as laid was not satisfactory to plaintiff in error and to Nagle, and that said parties expressed their dissatisfaction with the work and refused to accept the same.

No peremptory instruction was requested by plaintiff in error either at the close of the evidence for defendant in error or at the close of all the evidence.

Counsel for plaintiff in error says: "Shorn of all extraneous matters, the case resolves itself into the simple question of law whether or not a person who has entered into a contract to perform work to the satisfaction of the other party to the contract and to the satisfaction of a disinterested third party, can recover the value of his work, under the contract, when neither the other contracting party nor the third party is satisfied with the work, and such dissatisfaction is based upon substantial grounds, there being no fraud in the expression of dissatisfaction."

Whether or not the dissatisfaction of plaintiff in error and Nagle, with the floor as laid, was based upon substantial grounds was a question of fact for the jury with reference to which, as we have heretofore said, the evidence is in irreconcilable conflict, and we can not say that upon that issue the verdict of the jury was unwarranted.

It is also insisted by plaintiff in error that in the absence of any evidence tending to show that the action of plaintiff in error and Nagle in refusing to accept the work was induced by fraud or collusion, the mere fact that

said work was not perfectly satisfactory to them precludes a recovery by defendant in error; that an essential prerequisite to the right of defendant in error to recover under the terms of the contract is that the work should have been performed to the perfect satisfaction of said parties; that the rule sometimes applied in respect to contracts requiring the work to be done to the satisfaction of one of the parties to the contract, or to the satisfaction of a third party, that work which would satisfy the requirements of a reasonable man is satisfactory within the meaning of the contract, is not applicable to the contract here involved.

The trial court instructed the jury orally, and among other instructions so given to the jury, was the following:

"You are further instructed that if you find from the evidence that the defendant agreed to pay the plaintiff fifty per cent of the contract price for work to be done and material to be furnished by the plaintiff in laying a certain composition floor in the building of the defendant thirty days after the date of said contract, and, if you further find that in and by the contract therefor the defendant further agreed to pay to the plaintiff the remaining fifty per cent of the contract price when the contract was perfectly satisfactory to the defendant and to one George Nagle, and, if you find further from the evidence that the plaintiff completed said contract and complied with all its provisions and that the floor was laid in such a manner as to satisfy the requirements and demands of a reasonable man under similar circumstances, then the court instructs you that your verdict should be for the plaintiff."

Plaintiff in error interposed no objection to this instruction as given by the court, and he must now be held to have acquiesced in the statement of the law, as embodied in said instruction.

In the absence of any objection by plaintiff in error in the trial court to the instruction so given, the question now sought to be raised is not preserved for

review. East v. Foxworth, 156 Ill. App., 768; People v. Bank, 185 Ill. App., 484; Harden v. Callahan, 187 Ill. App., 318.

The judgment of the Municipal Court is affirmed.

JUDGMENT REVERSED.

SS - 19701.

SIMON F. GARY,

Plaintiff in Error,

IN ERROR TO

vs.

MUNICIPAL COURT

CHARLES R. BEADLES,

Defendant in Error.

OF CHICAGO.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

1921 A. 459

This is a suit originally instituted in the Municipal Court by plaintiff in error against defendant in error to recover \$300 claimed to be due plaintiff in error for professional legal services in defending a suit instituted in the Municipal Court by E. C. Wright and L. O. Gilliland against defendant in error to recover real estate broker's commissions, wherein judgment was entered against defendant in error for \$1,500. In the present case there was a verdict in favor of defendant in error and judgment against plaintiff in error for costs.

It is conceded that the judgment for \$1,500 recovered by Wright and Gilliland against defendant in error was through the efforts of plaintiff in error compromised and settled and that by agreement of the parties said judgment was assigned to plaintiff in error. It is further conceded that defendant in error gave to plaintiff in error a check for \$987 to be applied in the matter of the compromise settlement of said judgment.

Plaintiff in error testified that he finally succeeded in settling the judgment against defendant in error for something less than \$900; that he had seen the figures \$987 and presumed they were correct, but had no definite recollection regarding it; that everything he received from defendant in error was turned over by him to the attorneys for Wright and Gilliland. The record discloses that the

actual consideration paid by plaintiff in error to Wright and Gilliland in compromise settlement of said judgment and for its assignment to him was \$825.

Defendant in error testified that he requested plaintiff in error to ask the judgment creditors if they would not be reasonable in making some sort of a settlement and that they finally agreed to settle; that plaintiff in error said a settlement could be had for \$827, if defendant in error would be able to raise that much money; that at the last interview he had with plaintiff in error before paying over the money, they summed up the situation and found that the judgment was for \$825 and that there was some little costs amounting to something like \$11; that plaintiff in error said he didn't want to be hard on witness and if witness would pay him \$20, he would call it square; that by paying \$827, the whole transaction could be finished; that the \$827 would pay off the judgment and settle everything in full. While plaintiff in error testified generally that he had not been paid anything for the services rendered by him in the proceedings wherein judgment had been rendered against defendant in error, he did not deny that he made the statements attributed to him by defendant in error.

It is insisted by plaintiff in error that as the affidavit of merits filed by defendant in error did not aver as grounds of defense that there had been an accord and satisfaction of the claim sued for, or that the claim of plaintiff in error for legal services had been paid, such grounds of defense were not available to defendant in error, and that the testimony of defendant in error in support thereof was improperly admitted for the consideration of the jury. Plaintiff in error interposed no objection to the competency or relevancy of the testimony of defendant in error

with reference to an accord and satisfaction or payment of the claim sued for, and neither intimated nor suggested that said grounds of defense were not embraced within the affidavit of merits. If proper objection had been made by plaintiff in error in apt time, such objection might have been met by an amendment of the affidavit of merits. It is now too late to raise an objection not made in the trial court which might have been obviated if made there. City of Lincoln v. O. & A. R. R. Co., 182 Ill., 98.

Of the numerous instructions given by the court, but one, of which complaint is made, is set out in the abstract. It is a well settled rule that alleged error in giving instructions will not be considered on appeal or writ of error unless all the instructions given are set out in full in the abstract. Thompson v. Prosser, 192 Ill., 79; People v. Weil, 243 Ill., 308. A reference, however, to the record discloses that at least three other instructions relating to the issues of payment and accord and satisfaction, as to which instructions no complaint is made, were given to the jury. While the instruction set out in the abstract and here complained of is not free from criticism, we are not disposed to regard it as prejudicially erroneous in view of the fact that the testimony of defendant in error relative to the matters there presented stands uncontradicted.

It is finally insisted that the trial court improperly overruled the motion of plaintiff in error for a new trial, which motion was supported by affidavits setting forth matters claimed to constitute newly discovered evidence, which would be material and conclusive in favor of plaintiff in error upon another trial of the case.

The failure of plaintiff in error to deny the truth of the statements attributed to him by defendant in error to the effect that plaintiff in error would call it square, if defendant in error would pay him \$50, and that upon the payment by defendant in error of \$387 everything would be settled in full, tends to depreciate the probative force of the alleged newly discovered evidence. The evidence relied upon was in the possession of defendant in error at the time of the trial. True, he had then forgotten the fact, but he cannot then have forgotten whether or not he made the statements testified to by defendant in error. Furthermore, proof of the alleged newly discovered evidence would not conclusively establish the falsity of the statements attributed to him by defendant in error, because, nevertheless, plaintiff in error may have made such statements, having then forgotten to include the item due to the court reporter.

We perceive no substantial error in the record of which plaintiff in error may properly complain, and the judgment is affirmed.

JUDGMENT AFFIRMED.

329 - 19728.

CITY OF CHICAGO,

Defendant in Error,

vs.

BARRETT MANUFACTURING COMPANY,
a Corporation,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

1921A. 460

In a suit instituted in the Municipal Court by defendant in error to recover a penalty for the alleged violation by plaintiff in error of Sections 1425, 1426 and 1430 of the Municipal Code of the City of Chicago, a trial by the court resulted in a finding against plaintiff in error as to section 1425 and a judgment imposing a fine of \$10.

The several sections of the Municipal Code which plaintiff in error is charged with having violated are as follows:

"1425. Matters and things detrimental to health). No building, vehicle, structure, receptacle or thing used or to be used for any purpose whatever, shall be made, used, kept, maintained or operated in the city, if the use, keeping, maintaining or operating of such building, vehicle, structure, receptacle or thing shall be the occasion of any nuisance, or dangerous or detrimental to health."

"1426. General prohibition of unhealthful business.) No substance, matter or thing of any kind whatever, which shall be dangerous or detrimental to health, shall be allowed to exist in connection with any business, or to be used therein, or to be used in any work or labor carried on or to be carried on or prosecuted in the city, and no nuisance shall be permitted to exist in connection with any business or in connection with any such work or labor."

"1430. Factory, etc. - noxious or offensive.) Any factory, yard, building or structure of any kind, or tallow chandler's shop, soap factory, tannery, distillery, livery stable, cattle yard or shed, barn, packing house, slaughter house or rendering establishment which shall become noxious, foul or offensive, is hereby declared a nuisance, and the person or persons owning, keeping or maintaining or in possession, charge or control of any such factory, shop, yard, house, building or structure aforesaid, shall be fined in a sum not less than twenty-five and not exceeding one hundred dollars for each offense."

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Upon the trial, counsel for defendant in error, at the close of the evidence, submitted any judgment under the evidence, to hold plaintiff in error liable upon the charge that the effluens complained of was dangerous or detrimental to health.

The hearing was concluded on February 3, 1913, and the court having held the case under advisement until June 14, 1913, then entered its findings as follows:

"1. The court finds the defendant not guilty of having violated section 1430 of the Chicago Code of 1911, in manner and form as charged in the amended bill of particulars herein.

"2. The court finds the defendant not guilty of having violated section 1430 of the Chicago Code of 1911, in manner and form as charged in the amended bill of particulars herein.

"3. The court finds the defendant did violate section 1435 of the Chicago Code of 1911, in that between the times specified in the amended bill of particulars herein, to wit: July 15, 1911, and August 4, 1911, it did maintain and operate two certain receptacles, to wit: two shallow concrete pits, on the surface of the ground, commonly known as 'pitch bays', for the receipt of hot pitch, from which 'pitch bays', on two different occasions between the times specified in the amended bill of particulars, vapors and fumes were permitted to escape, which vapors and fumes were dangerous and detrimental to health, and there will be a fine of \$20 against the defendant."

It will be observed that the finding, wherein plaintiff in error is held to have violated section 1435, is predicated solely upon the fact that the vapors and fumes in question were dangerous and detrimental to health.

It is incumbent on defendant in error to establish a violation of the ordinance by a clear preponderance of the evidence, & mere preponderance of the evidence is not sufficient. City of Chicago v. Bagg, 137 Ill. App., 175.

Plaintiff in error is engaged in the manufacture of roofing and paving materials and coal tar products, and operates an extensive plant located at 3566 Sacramento avenue. The district in which the plant is located is essentially a manufacturing district, wherein are located the plants of

the Liquid Carbonic Company, the McCormick branch of the International Harvester Company, the National Malleable Castings Company, the Pilsen Brewing Co., the C. F. Massey Co., and other extensive manufacturing plants. To the east and immediately across Sacramento avenue are located the Bridewell and the dog pound. On the south the plant runs to the west fork of the south branch of the Chicago River. There are some dwelling houses one or two blocks west on Whipple street and Albany avenue and north east on Sacramento avenue. The plant of the Pilsen Brewing Company is north and west.

In the process of distillation of crude coal tar the tar is pumped into a horizontal still where it is heated until it commences to vaporize, and heat is continued to be applied until sufficient vapor has been formed to leave a residue of thin liquid pitch in the still. The vapor is drawn from the still through condensers, where it is transformed into a liquid known as ordinary creosote oil. When distillation is complete the temperature of the pitch in the still is between 500 and 600 degrees Fahrenheit. The pitch is then transferred by steam pressure from the still into coolers where the temperature of the pitch is lowered to about 250 degrees Fahrenheit, when it is permitted to run into concrete receptacles known as "pitch bays". In the last process mentioned some vapor and fumes arise from the pitch as it leaves the coolers and flows into the "pitch bays." The presence of these vapors and fumes in the atmosphere constitutes the alleged violation by plaintiff in error of the section of the ordinance in question.

It is apparent from an inspection of the photographs in evidence, and from a consideration of the testimony of witnesses, that the vapor arising from the pitch is

soon dissipated in the atmosphere within the enclosure of the plant, and that under generally prevailing conditions such vapor is not observable beyond the bounds of the plant. It is clearly established by the testimony of eminent experts in the profession of chemistry and by the testimony of numerous employees of plaintiff in error, who had been engaged for many years in and about the work in question, that the escaping vapors and fumes are not deleterious to health, but on the other hand that the main constituent elements of such vapors and fumes constitute the bases of many preventive and restorative remedies for human ills.

Several of the witnesses called on behalf of defendant in error and who testified to having observed smoke and vapor coming from the plant of plaintiff in error evidently had reference to smoke and vapor which escaped from the chimney or chimneys in the plant, and this nuisance, if such it was, is not the nuisance charged in the complaint. Among these witnesses was Mrs. Hollick residing on Whipple street who testified that the smoke came into her house, and in answer to the question, "What effect did it have on you?" testified, "My children all sick and coughing and vomiting and drinking water all time and crying so, and so on." Another witness, Mrs. Polch, testified that as a result of the smoke her children got all kinds of germs, and had the whooping cough, and that she herself was getting consumption.

Plaintiff in error called a large number of apparently credible and disinterested witnesses whose opportunity for observation, and whose habitual proximity to the plant of plaintiff in error qualified them to know the facts, who testified that the vapor and fumes arising from the "Pitch bays" had never been noticed by them and had never caused them any trouble or annoyance. The uncontroverted evidence

shows that the plant of plaintiff in error is equipped with the best known appliances, and is operated in the most efficient manner, in the respect here involved.

The finding and judgment are not supported by the evidence and the judgment is reversed.

JUDGMENT REVERSED.

364 - 18765.

EMILIE HERCH,
Defendant in Error,

vs.

CARLO LAZZARINI,
Plaintiff in Error,

CHARLES P. MOLTROP, garnishee,
Defendant in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

1921 A. 462

MR. PRESIDING JUSTICE RADME
DELIVERED THE OPINION OF THE COURT.

This is a suit in attachment instituted in the Municipal Court by defendant in error against plaintiff in error, wherein Charles P. Moltrop was summoned as garnishee.

The affidavit of defendant in error sets up as grounds for attachment, "that the said Carlo Lazzarini can not be found; that upon diligent inquiry, affiant has not been able to ascertain his place of residence."

After publication of notice to plaintiff in error he was, on June 9, 1913, defaulted for want of appearance, and upon a hearing then had judgment was entered in favor of defendant in error against plaintiff in error for \$350.00.

On June 11, 1913, plaintiff in error filed his motion to vacate and set aside said judgment and for leave to file his affidavit of defence within five days. The affidavit of plaintiff in error in support of said motion states that he is a resident of the city of Chicago, residing at 2008 Lane Court; that he had been residing in the City of Chicago for seven years last past, and that it has never been his desire or intention to leave said city; that he had been defendant in error not less than once every week during April and May, 1913, and during the portion of June then past; that he had never received any notice of the pendency of

the suit; that defendant in error had never made any demand on him for any money due her; that the affidavit of publication, wherein defendant in error stated that plaintiff in error was not a resident of the city of Chicago, or that he could not be found within the jurisdiction of the Municipal Court, was a misrepresentation and an imposition on the court; that he verily believes that he has a good defense to the suit upon the merits to the whole of the demand.

The motion of plaintiff in error was overruled by the court on June 18, 1913, and the court then upon a consideration of the answer of the garnishee found that said garnishee had in his hands \$861.36 belonging to plaintiff in error, and entered judgment in favor of defendant in error against the garnishee for said amount. On June 20, 1913, plaintiff in error again moved the court to vacate and set aside the judgment of June 9th preceding, and in support of such motion also filed his affidavit setting forth with greater particularity the grounds upon which he relied, which motion was also overruled by the court.

There is no appearance by defendant in error in this court.

It is first urged that the affidavit for attachment upon which the notice of publication was based is insufficient, and that the court acquired no jurisdiction thereby to enter judgment against plaintiff in error by default.

The affidavit is clearly defective and irregular and if it had been attacked in the lower court, doubtless would have been held to be insufficient. The affidavit was, however, amendable there, and if so amendable, it was not void. Irreducible Furnace Co. v. William H. Co., 101 Ill., 532. The objection can not be raised for the first time in this court. Irreducible Furnace Co. v. William H. Co., supra; Hoff v. Alvin, 132 Ill. App., 41.

The affidavit filed by plaintiff in error June 11, 1913, in support of the motion to vacate and set aside the judgment entered June 9, preceding, and for leave to defend upon the merits fails to state any facts in support of the motion which should have moved the court to grant the same. The insufficiency of the affidavit was evidently recognized by plaintiff in error, when, on June 20, 1913, he filed another affidavit in support of another motion then made by him to vacate and set aside said judgment. The matters set forth in the affidavit filed in support of the second motion made by plaintiff in error to vacate and set aside said judgment were all within his knowledge when he made the affidavit in support of the first motion made by him, and he was unaware of any rule of procedure or practice which, under such circumstances, warrants a party in making a second motion after a prior like motion has been overruled by the court. The motion of June 20, 1913, was for this reason properly overruled. Again, the bill of exceptions filed in the case contains no certificate by the trial judge that it contains all the evidence offered and received upon the hearing of said motions, and in the absence of such certificate the presumption may properly be indulged, in support of the action of the court, that the court had before it other and sufficient evidence, such as the oral testimony of witnesses. Marake v. Willard, 68 Ill. App., 25; Todd v. Manning, 116 Ill. App., 676.

The judgment against the garnishee is in improper form. The judgment should have been in favor of plaintiff in error against the garnishee for the use of defendant in error. Such informality in a judgment, when attacked by the garnishee, has been held to require a reversal of the judgment, (Chicago, B. I. & P. Ry. Co. v. Mason, 11 Ill.

App., 305; Madala v. Tulas Roller Mfg. Co., 31 Ill. App., 308), but as plaintiff in error is not harmed thereby, he can not complain.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

409 - 19011.

CATHERINE HUTCHISON,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

1921A. 464
MR. JUSTICE DAVIS
DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellant to recover damages for personal injuries, wherein a trial by jury in the Circuit Court resulted in a verdict and judgment against appellant for \$3,300.

The declaration charges that while appellee, in the exercise of due care, was in the act of boarding one of appellant's street cars, which had there been brought to a standstill, appellant, by its servants, negligently, carelessly and suddenly started said car, and thereby appellee was thrown to the ground and injured.

It is first insisted that the verdict is against the manifest weight of the evidence.

Shortly after the noon hour on November 11, 1903, appellee, who was then 57 years of age, five feet or five feet one and one-half inches in height, and weighed 126 pounds, desired to board one of appellant's street cars, at the corner of State and Washington streets, for the purpose of being carried south on State street to 63rd street, and thence west, by transfer, on 63rd street to Sangamon street. The car in question was of the pay-as-you-enter type, and then stopped at the rear crossing to receive and discharge passengers; that is, south bound cars on State street so stopped on the north side of Washington street.

There were three trucks on State street. The two outer tracks being owned by appellant, and the car in question was running on the middle track.

Appellee testified that when she reached the north west corner of State and Washington streets a State street car was just moving away and was followed immediately by a Center avenue car; that when another State street car came and stopped, she got on the first step and took hold of the upright iron rail with her right hand; that she had a small package of soap weighing about 3 pounds under her left arm and was carrying a small satchel in her left hand; that as she was raising her right foot from the step to the platform, she released her hold of the upright rod for the purpose of taking hold of the horizontal rail and so assisting herself to get on the platform; that just after she released her hold of the upright rail and before she had an opportunity to grasp the horizontal rail the car started up with a jerk and she was thrown to the ground; that while she was falling the conductor who was on the rear platform grabbed the right sleeve of her coat, but was unable to hold it; that when she fell she fell partly on her back and right side, more on her back, with her head to the southwest; that the car ran on across Washington street and stopped south of that street; that a policeman came and helped her up and two policemen helped her on to the same car where it stood south of Washington street; that she became confused and felt dizzy and sick at her stomach and so continued until she arrived at her home. She further testified that after she reached home she experienced a severe nervous shock, shock all over and could not stop; that she telephoned for her family physician, Dr. Thomas, and went to bed; that next day she felt a great deal worse, felt bad in her back, down her spine,

and had a pain in the back of her head and in her right shoulder and side; that she was confused and dizzy, her eyes blurred, and her kidneys were affected; that she was confined to her bed until the following Christmas day, when she got up for the first time about an hour; that she had tried to get up two or three times before, but was unable to stay up; that she was not able to be out on the porch until the last day of April, 1909; that she then experienced a creepy feeling in her hands and limbs; that she could not straighten up and was unable to do much work about the house. She further testified that in March, 1912, she had a stroke on her right side which affected that side and also affected her speech; that for about three weeks she could not tell very much what she said; that her right leg was a little numb and that she partially lost the use of her right hand; that in September, 1912, she had another stroke on her left side, which affected her hand and limbs on that side; that she had had no other illness or trouble prior to the accident, save that she sprained her ankle in 1901, and was affected with rheumatism for about a month in 1906.

Dr. Thomas, the family physician of appellee, testified that he called at her home about 8 o'clock in the evening of the same day and found her in bed; that she was quite helpless to handle herself; that at the lower part of her spine, at the ilio-sacral junction, he observed a confluent spot about the size of the top of a drinking glass; that her right shoulder was bruised and lame and useless for the time being in any effort or exertion; that she was dizzy, had blurring before her eyes and had severe pain and soreness about the nape of the neck, at the base of the brain and upper part of the spine; that she had bruised marks on her thighs and a bruise on the leg below the knee;

that she was unable to collect her thoughts or to talk well; that she did not seem to have control of the organs of speech to speak distinctly, and that there was a muscular tremor in her hands. His further testimony regarding the subsequent condition and symptoms of appellee is corroborative of her testimony.

Three witnesses called by appellant testified that the car was in motion at the time appellee attempted to board the same, and that appellee fell while she was attempting to grab the upright rail, or immediately after grabbing said rail, while the car was in motion.

The number of witnesses testifying to a particular fact or state of facts is an important element to be considered in determining where lies the preponderance of the evidence, but a consideration of other elements no less important, frequently interpose to determine that question. A careful consideration of the testimony of the several witnesses impels us to the conclusion that, notwithstanding the element of numbers is on the side of appellant, other elements proper to be considered minimize the probative force and effect of the testimony of appellant's three witnesses to such an extent that we would be unwarranted in holding that the verdict of the jury upon the issues involving the negligence of appellant and due care on the part of appellee is against the manifest weight of the evidence. To elaborate the grounds of this conclusion would extend this opinion beyond all reasonable bounds. It is sufficient to say that in many important and material particulars the testimony of the three witnesses referred to is contradictory, inconsistent with established facts and inherently improbable.

Complaint is made of the action of the court in refusing the first instruction tendered by appellant. The instruction was sufficiently covered by other instructions

given to the jury, and it was, therefore, properly refused.

Whether or not the attacks of paralysis suffered by appellee in March and September, 1913, resulted from the injury sustained by her was a sharply controverted question upon the trial. Some evidence was introduced on behalf of appellee tending to show that such attacks of paralysis were directly consequent to the injury sustained by her, while the evidence of a witness called by appellant, as an expert, tended to show that there was no relation between the injury sustained by appellee and the long subsequent attacks of paralysis with which she was afflicted.

Dr. Thomas, the family physician of appellee, who attended her in the evening of the day she was injured, after describing her condition and symptoms, as he observed them, was asked this question: "Now, from the examination you made of this lady, when you were called that afternoon or evening, did you form an opinion as to what she was suffering at the time of the injury, at the time she was laid up there," Without objection the witness replied as follows:

"Yes, sir, she has sustained a concussion of the spinal tract or spinal cord and this had extended up through the brain, and that is what gave her that dazed condition, and want of ready control over both her thinking abilities and control of co-ordinated speech. And that also affected the sight to the extent of creating a blurred condition."

The witness was then asked:

"Now, doctor, as a medical man, have you an opinion, from your examination of her, and your treatment of her, as to what was the cause of the paralytic stroke that you have described in March and September, 1913?"

The question was objected to as incompetent, and as invading the province of the jury, which objection was overruled, and the witness replied: "Why, certainly," The witness was then asked: "What is that opinion?" And upon the overruling of a like objection, he replied:

"In all paralytic affections there is a disturbed condition of the nutrition in some way. It may be a blood clot that causes pressure or that is produced by a rupture of some little blood-vessel. In this case it would be of an extremely small nature because the attack was limited in its character, and again it may be due to some fibrinous clot in the blood carrying along and getting plugged up and exerting pressure in that way, but in all cases of that kind there is a degenerative condition of the nutrition of the spinal axis or the parts that the paralytic stroke takes place in."

A motion to strike out this answer was overruled.

To a hypothetical question, predicated upon the facts as claimed by appellee to exist under the proof, and concluding with the injury, whether or not in the opinion of the witness, as a medical man, there was a connection between the accident and the fall as described and the later conditions of the patient, as described, the witness replied:

"Yes. My opinion is that it is from the concussive injury at the time of the fall. Concussion means a violent shaking up of the tissue and injuries were sustained to that tissue and we all know that any injury to the nervous system is the hardest thing about in the human system to recover from, and the reason is that --"

The following then occurred:

"Mr. Condon: Just a moment. It is quite apparent -- you will agree, I suppose, that this is incompetent."

"Mr. Spencer: The answer to that question should be a categorical answer as to what the connection is. If you want to give reasons then or counsel wants then we may have them."

"A. The connection will be this degenerative state of the nerve tissue and its surrounding connective tissues leading to developments that would bring about or are liable to bring about a paralytic attack."

The motion of appellant's counsel to strike out the answer was denied.

It is insisted that the rulings of the trial court in the particulars mentioned infringed the rule that a witness should not be permitted to give his opinion on the very fact which the jury is to determine, and in support of such in-

evidence counsel cite Kohlmeier v. Chicago & So. T. Co., 253 Ill., 134.

In the Schlaueder case the witness was asked and permitted to answer this question: "Have you an opinion whether or not Mrs. Schlaueder is or is not permanently injured as a result of that accident?" No like question relating to the cause of the injury was asked the witness in the case at bar, but the inquiries had reference to the relation between certain injuries, which appellant unquestionably sustained as a result of her fall, and her subsequent physical condition as manifested in attacks of partial paralysis. Upon this question the opinion of a physician having knowledge of the subject was proper to be considered by the jury. Dahry v. Chicago City Ry. Co., 229 Ill., 548; Chicago N. Trac. Co. v. Roberts, 229 Ill., 491; Kohlmeier v. Chicago City Ry. Co., 253 Ill., 494.

It is also urged that the same witness was improperly permitted to express his opinion that appellee was liable to have recurrent attacks of paralysis, and that the degenerative state of the nerve tissue and its surrounding connective tissue might lead to developments that are liable to bring about a paralytic stroke. Liable means more or less probable. "To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their recurrence as amounts to a reasonable certainty that they will result from the original injury." Leuth v. C. N. T. Co., 244 Ill., 244. A mere probability is not sufficient. Any opinion of the witness short of a reasonable certainty that appellee would be subject to recurrent attacks of paralysis, as a result of her injuries, should have been rejected as speculative and conjectural. The opinions of the witness, as

expressed, should have been excluded, but as appellant makes no complaint that the damages awarded by the jury are excessive, and as it is evident that, excluding the element of apprehended future consequences, the damages awarded are not excessive for present injuries actually sustained, the judgment should not be reversed for the failure to exclude such opinion of the witness.

Dr. Cox, a witness called by appellee, testified, in part, that "it would not be necessary for an injury to the motor area to be such that it would cause the person to lose locomotion immediately, in order to result later in paralysis." The witness was then asked, "How might it come about?" To this question an objection was interposed and overruled, and the witness answered: "Well, it might come about in a slow way. The injury might be so little, and we might say, for example, the size of a needle point, that it would not exactly strike the motor area, the centers, and of course the centers would not get the effect of it. Then, that later could be enlarged or could recur with a larger hemorrhage, and the pressure of that would affect the motor centers."

It is urged that this testimony of the witness was purely speculative and, therefore, incompetent. The subject matter of the inquiry then under consideration was whether paralysis, if produced by an injury, would necessarily follow almost immediately, or whether it might develop at a later period, and also whether or not an injury such as appellee claimed to have sustained was capable of producing paralysis. It was insisted by appellant that paralysis, if produced by an injury, would necessarily follow almost immediately, and also that the injury which appellee claimed to have sustained was incapable of producing paralysis. The testimony of the

witness was directed to these matters, and it was competent for the witness to express his opinion thereon and to state his reasons for such opinion. We perceive no error in admitting the testimony of the witness.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

SON - 2015.

2015

CITY OF CHICAGO,

PLAINTIFF IN ERROR,

vs.

CLARENCE E. GREEN,

Defendant in Error.

COURT OF

MUNICIPAL COURT

OF CHICAGO.

192 I.A. 472

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

Suit was instituted in the Municipal Court by the City of Chicago against Clarence E. Green to recover a penalty for the alleged violation by the defendant of section 1541 of the Municipal Code, which provides, in part, as follows:

"No person shall keep open any saloon, bar room or tippling house during the night time between the hours of one o'clock a. m. and five o'clock a. m. *****Any person violating any of the foregoing provisions shall be fined not less than twenty dollars nor more than one hundred dollars for each offense."

A trial before the court resulted in a finding for the defendant and judgment against plaintiff in bar of its action, to reverse which judgment the plaintiff prosecuted this writ of error. There is no appearance in this court by defendant in error.

Irving A. Nees was the only witness called on behalf of plaintiff in error, and his testimony stands uncontradicted. He testified on direct examination that on the morning of January 1, 1913, he visited the place owned by defendant in error at 134 N. Dearborn street, at the hour of 1:55, and then and there purchased over the bar a glass of blackberry brandy and paid for it; that the place was open at the time; that the side door leading into the place was open, and that there was an illuminated sign over the door with the word "Bar"; that there were four or five men drinking in the saloon at that time. On cross-examination the

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witness testified that he did not know whether defendant in error owned the place or not; that he did not know defendant in error; that all he saw was the sign on the door.

Counsel for plaintiff in error says: "The witness for the city testified that there was a sign on the place, and that on the sign was the name of the defendant; that there was a sign on the door with the name "Clarence F. Green". No such testimony of the witness appears in the abstract and a search of the record fails to disclose that the witness so testified. The only sign referred to by the witness as appearing on the door of the place was the word "Bar". Undoubtedly, if the record sustained the statement of counsel with reference to the testimony of the witness, such testimony would, as counsel says, be sufficient to prove ownership, of any evidence in the absence/ to the contrary. The failure of plaintiff in error to make definite proof of the fact, if it be a fact, that the saloon was conducted by defendant in error, is inexcusable and inexplicable.

It is, however, further insisted by plaintiff in error, that as the ownership of the place was not put in issue by the pleadings, it was not incumbent upon plaintiff in error to make any proof tending to show that the saloon was conducted by defendant in error, and counsel cites City of Chicago v. Jambor Towing & Freighting Co., 161 Ill. App., 307, in support of such insistence. That case was one in which a penalty was sought to be recovered for an alleged violation of a so-called smoke ordinance, and where it was charged that a tug owned by the defendant emitted large volumes of smoke, etc. Proof was made tending to show that the defendant was the owner of the tug, but it was there further said that "as the real controversy was not over the ownership of the tug, but the issuance of dense smoke, the

ownership

being a matter of inducement, it was not necessary to prove it unless it was specially denied."

This statement was predicated upon the case of Chicago Union Traction Co. v. Jorio, 227 Ill., 63, wherein it was held that, in a case of the character there involved, a plea of the general issue did not put in issue the defendant's ownership, possession or operation of the property or instrumentality which caused the injury. While this rule may not improperly be applied in a case where the gist of the offense charged is the emission of dense smoke from the smoke stack of a locomotive, steam boat or tug, regarded as an instrumentality which causes the act complained of, it has no application to a case such as the one at bar. In the present case the complaint charges "that the defendant did on to wit, the first day of January, 1913, keep open a certain saloon, barroom or tippling house at, to wit, 134 North Dearborn street, within the said city, during the night-time between the hours of one o'clock, a. m., and five o'clock, a. m., and did within the place sell intoxicating liquors between the said hours." The charge that defendant did, etc., was not mere matter of inducement. The gist of the offense charged did not consist in the status of the property merely, but in the unlawful use and occupation of the property by defendant in error or his servants.

In the absence of any evidence whatever tending to show that defendant in error conducted the saloon at the place designated in the complaint, the finding of the trial court was right and the judgment is affirmed.

JUDGMENT AFFIRMED.

307 - 20240.

JOHN S. STEVENS,
Defendant in Error,
vs.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

ERNEST BECKER,
Plaintiff in Error.

192 I.A. 474

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This suit was instituted in the Municipal Court February 14, 1912, by John S. Stevens Against Ernest Becker to recover upon 10 promissory notes for \$50 each, bearing date December 14, 1909, maturing respectively September 1, 1910, and the first day of each month thereafter to June 1, 1911, inclusive. The notes were a portion of a series of notes aggregating \$2,000, being the amount of a loan which defendant procured from Emil H. Seeman, and were secured by a trust deed on certain real estate owned by the defendant. The notes were payable to the order of the maker and bear the endorsement of himself and one James Graham. At the close of all the evidence the court gave to the jury a peremptory instruction to find the issues for the plaintiff and to assess his damages against defendant at \$761.56, and upon such verdict judgment was entered against defendant.

It appears from the evidence introduced on behalf of plaintiff in error that on April 8, 1909, he employed one James T. Graham to construct a building for the sum of \$5,000, and that he borrowed \$4,000 from Greensbaum & Sons, which was to be applied by the latter in paying the building contractor as the work progressed; that the full amount of said loan was thus applied by Greensbaum & Sons, and it then became

necessary for plaintiff in error to procure an additional loan for the purpose of completing the building; that plaintiff in error procured such additional loan of \$4,200 from Emil H. Seeman, which loan was secured by a second trust deed upon the property; that the notes sued on are a portion of a series of notes executed by plaintiff in error for said loan of \$4,200; that at the time said loan was procured from Seeman, it was agreed between the parties that the amount of said loan should be paid by Seeman to Greenbaum & Sons to be by them paid to the contractor as the work progressed, and when the contract had been completed by him; that notwithstanding said agreement and in violation thereof Seeman paid the full amount of said loan directly to the contractor Graham; that thereafter Graham abandoned the contract and in consequence thereof plaintiff in error was obliged to expend \$1,575 in completing the work in accordance with the terms of his contract with Graham. It further appears from the evidence that after the maturity of some of the notes in question they were in the possession of one Charles F. Glaeser, who was then acting in some capacity for Seeman, and that Seeman was then urging and soliciting plaintiff in error to pay said notes; that Defendant in error Stevens is a clerk in the employ of the attorneys who instituted this suit against plaintiff in error, and that said attorneys were also acting as attorneys for Seeman. There is evidence tending to show that the indorsement of the notes by Graham was not made in the usual course of the negotiation of said notes to Seeman, but that said notes were indorsed by Graham at the instance of Seeman, and that Graham was never the holder of said notes in due course; that if the notes in question were in fact negotiated, they were so negotiated by Seeman and not by Graham. Defendant in error claims

title to the notes as a holder in due course from Seeman, but there are circumstances in evidence tending to show that defendant in error is a mere depository of the notes through whom Seeman is seeking to effect their collection.

Section 52 of the Negotiable Instruments Law defines a holder in due course, thus:

"A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 53 provides:

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

Section 54 provides:

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title was a holder in due course. But the last mentioned rule does not apply in favor of a party who becomes bound on the instrument prior to the acquisition of such defective title."

The notes in question having been indorsed by the maker in blank were negotiable by delivery, (Sec. 34, Negotiable Instruments Law, Stat. 1913, p. 1330,) and if defendant in error acquired title to said notes, he acquired such title by delivery from Seeman.

The only statements and admissions by Hansen, admissible in evidence, were such as were made by him while he was the holder of the notes after maturity and before they were delivered to defendant in error. Ranchall v. Kimbark, 118 Ill., 121; First National Bank of Chicago v. Strang, 130 Ill., 347.

There was sufficient competent evidence adduced to require the submission to the jury of the question whether or not defendant in error was the holder of the notes in due course and the trial court erred in giving to the jury a peremptory instruction to find the issue for defendant in error.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

314 - 20849.

PAULINE ROBISON,
Appellee,

SUPERIOR FROM
COUNTY COURT,
COOK COUNTY.

vs.
UNITED STATES HEALTH AND ACCIDENT
INSURANCE COMPANY, a corporation,
Appellant.

1921 A. 475

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the County Court upon a health and accident insurance policy issued by appellant to James Robison, husband of appellee, December 27, 1911, wherein a policy was made as beneficiary in case of the death of the insured by accident. A trial by jury resulted in a verdict and judgment against appellant for \$500. There is no appearance here by appellee.

By the terms of the policy Robison was insured against; first, the effects resulting, directly and exclusively of all other causes, from bodily injury sustained through external, violent and accidental means, excluding suicide, sane or insane; and, second, disability resulting from illness contract during the life of the policy and after it had been maintained in continuous force for 30 days. The policy provides for the payment of a monthly accident indemnity of \$40, a monthly illness indemnity of the like amount, and for the payment of \$500 in the event of loss of life. The policy also contains a provision as follows:

"Written notice must be given to the Company within twenty days from the date of any accident or the beginning of disability from illness upon which claim is based, with full name and address of the assured, unless the notices herein specified shall be shown not to have been reasonably possible, in which event they must be so given as soon as

reasonably possible. Notice of a claim for indemnity shall be deemed sufficient only when given to the Home Office of the Company, at Saginaw, Michigan, or to a duly authorized agent of the Company in the city, town or county in which the assured shall reside at the time of giving such notice. Failure of the assured or beneficiary to comply strictly with said notice requirements shall limit the liability of the Company to one-tenth of the amount that would otherwise be payable."

About February 15, 1911, the insured filled out and forwarded to appellant a written notice of his illness, preparatory to claiming indemnity therefor. This notice states that the insured was taken ill on February 1, 1911; that he was first attended by a physician on the following day; that Dr. E. A. Majors was such physician. In answer to the question, "Name the disease", the insured stated, "Pleurisy, right lung, cough, difficult breathing, pain in chest." Accompanying such notice of illness was a written report to appellant by Dr. Majors of his examination of the insured. This report stated that the disease causing the disability was pleurisy and that the insured had no other disease; that the precise nature of the insured's illness was cough, cold and effusion of lungs; that the symptoms which led him (the doctor) to diagnose the disease as pleurisy were painful and distressed labored breathing, cough, pain in right side, scanty urine.

On March 4, 1911, the insured made a formal verified claim for indemnity on account of his illness, of \$10 per week for 4 weeks. Accompanying said claim by the insured was a written statement by his attending physician, wherein appear the following questions and answers:

"5. With what illness or disease was the Claimant afflicted, and to what extent? Answer Fully. Pleurisy, with some kidney lesion.

"6. Describe the symptoms that led you to diagnose the disease above stated. Ans. Pain in right side, with cough and scanty urine. Pain on breathing, fever."

Upon this claim by the insured for indemnity for illness he was paid \$36 by appellant.

The insured died on April 22, 1912.

The right of appellee to recover in this case is predicated upon the claim that the death of the insured was the result of an accident which he sustained on January 31, 1912. No formal written notice was ever served upon appellant by the insured or by appellee that the insured had ever sustained an accident, or that his death resulted from an accident, until this suit was instituted on July 30, 1913. There is, however, some claim by appellee that the giving of such notice was waived by appellant.

The only evidence in the record tending to show that the insured sustained an accident on January 31, 1912, is the testimony of appellee who stated that the insured then lifted a hard coal stove in the front room of their house; that the next day he complained about being ill and that his illness continued until his death. On cross examination the witness was asked to state the details of how the accident happened and he answered as follows:

"Well, it was a pretty bad day, and he wasn't working that day, so I says to him, I say, 'Jim,' I says, 'I have got a sine and I want to put it under my stove,' and he says, 'All right, Pauline, I will help,' so I catches hold of the sine, and he catches hold of the stove, and the stove was a hard coal burner, I guess it stood about that high (indicating), and he lifted the stove up, and I pushed the sine under it, and so all at once he said 'Oh, ay, I feel so funny,' and so I said, 'What's the matter Jim,' and he sat down, and he said, 'Oh, I feel awful bad,' and I says, 'Do you?' and he says, 'Yes.' Says I, 'Is there anything I can do?' and he says, 'No,' and he sat there and looked kind of funny,

and I looked at him and I said, 'Jim, do you want me to do anything for you?' and he says, 'No,' so I didn't say any more. And the next day I says, 'Jim, are you going to work?' and he said, 'No, I don't feel like going to work', he said; 'I can't. There is something bothers me here.' I said, 'Maybe you hurt yourself lifting the stove.' He said, 'Well, maybe I did; and I felt awful bad ever since I lifted it.' So I didn't say any more."

She testified that she called in Dr. Majors the following day and then told him about the accident.

Dr. Majors testified that he visited the insured professionally from February 3, 1918, until March 28th following; that neither the insured nor appellee ever told him that the insured had sustained an accident, and that he had never heard of an accident to the insured until he heard appellee testify in court; that when he first called upon the insured and made an inquiry as to the probable cause of the insured's illness, he was informed by the insured that he had gotten wet while he was working. He further testified that in his opinion the immediate cause of the deceased's death was Bright's disease; that he did not find any evidence of valvular heart trouble, and that the condition in which he found the insured could not have resulted from a strain.

Dr. Wm. Carter, called as a witness by appellee, testified that he attended the insured from about the middle of February until the time of his death; that in his opinion the insured was affected with valvular heart trouble due to a strain. The cross examination of this witness tends to depreciate the probative value of his testimony on direct examination.

The statement claimed to have been made by the insured to his wife, as testified to by her to the effect that

the illness of which he complained on February 1, 1910, was caused by a strain incident to lifting a coal stove on the day preceding, was not a part of the res gestae and was inadmissible to show that the insured had sustained an accident, or that the illness of which he then complained was caused by an accident. Globe Acc. Ins. Co. v. Garisch, 105 Ill., 623.

All of the facts and circumstances in evidence competent to be considered tend to show that the illness of which the insured complained and with which he was affected was due to causes other than an accident, and that the claim of appellee to the contrary was an afterthought.

Necessarily, the verdict of the jury was predicated upon a finding that the death of the insured was caused by an accident and such finding is against the manifest weight of the evidence in the case. The burden of proof on this issue was upon appellee. Woods v. Ill. Commercial Mortg. Assoc., 106 Ill. App., 38.

It is insisted by appellant that the failure of the insured or of appellee to give written notice of the happening of the accident within 30 days thereafter precludes a right of recovery unless the giving of such notice was waived by appellant within said 30 days.

Appellee did not become a claimant under the terms of the policy until the death of the insured and on the death of the insured occurred more than 30 days after he is alleged to have sustained an accident, the provision in the policy heretofore quoted with reference to the requirement of written notice to the insurer does not by its terms, when properly construed, apply to appellee. Globe Acc. Ins. Co. v. Garisch, ante.

The testimony of the witness, Nellie Morrison,



was presumably relied upon by appellee as tending to show a waiver by appellant of any written notice that the death of the insured was occasioned by an accident. Much of the testimony of this witness was clearly incompetent, and considered in its entirety, it is insufficient to establish a waiver by appellant. The party or parties with whom she claims to have communicated relative to the claim of appellee under the policy were not identified by her or by any other witness as sustaining any relation whatever to appellant.

Assuming for the sake of the argument that the insured sustained some injury, occasioned by lifting a stove, it is urged on behalf of appellant that there is a distinction between an accident per se and a mishap resulting from accidental means, and that as the injury claimed to have been sustained by the insured was occasioned by his act done voluntarily and in the ordinary way with no unforeseen or involuntary movement of the body, such injury can not be said to have resulted from accidental means. There has been much refinement of reasoning in the discussion of this question, which we are not now disposed to consider in its various phases, or to follow in announcing a rule to be applied in the case at bar. The general prevailing rule, and one which commands our approval, may be stated thus:

"If the insured's act was attended with an unexpected and unusual result, - one which could not have been reasonably anticipated, and which he did not intend to produce; that is, was not the natural or probable consequence of his act; and was not the result of design, but was produced unexpectedly and by chance, - the injury was caused by accidental means within the meaning of policies of accident insurance." See Hutton v. States Acc. Ins. Co., 186 Ill. App., 498, and cases there cited.

The application of this rule would embrace an injury resulting from the act of lifting a stove, as claimed in the present case, or from the act of lifting a box of



ashes and cinders as was involved in Globe Acc. Ins. Co. v. Callagh.

As to a further question raised by appellant relative to its liability where the death of the insured results from some disease which is occasioned by accident, or which co-operates with the accident in causing death, we concur in the views expressed in the well considered opinion by Mr. Justice Carnes in Crane v. Commercial Casualty Co., 179 Ill. App., 380.

The sixth instruction given at the instance of appellee is not based on any competent evidence, bearing upon the question of a waiver, and furthermore, said instruction is in direct conflict with the first and second instructions given at the instance of appellant. If there had been any competent evidence tending to show a waiver of notice by appellant, the first instruction given at its instance should have embodied a reference to the doctrine of waiver.

The fifth instruction given at the instance of appellee erroneously directs the attention of the jury to certain provisions as being contained in the policy which are apparently not contained therein.

For the errors stated the judgment is reversed and the cause remanded.

REVEREND AND HONORABLE.-

352 - 20037.

SIGMUND GLASER,
Defendant in Error,

vs.

THOMAS SCHRADER,
Plaintiff in Error.

NOTICE TO

MUNICIPAL COURT

OF CHICAGO.

1921 A. 478

MR. PRESIDING JUSTICE DRAKE
DELIVERED THE OPINION OF THE COURT.

This is a suit by defendant in error against plaintiff in error to recover \$1,000 as liquidated damages for the alleged breach by plaintiff in error of a written contract. At the trial in the Municipal Court defendant in error having introduced evidence in support of his claim and plaintiff in error having elected to offer no counter-vailing evidence, the court instructed the jury to return a verdict finding the issue for defendant in error and assessing his damages at \$1,000, and judgment was entered upon such verdict so returned.

It is insisted by plaintiff in error that the contract should be construed as providing for the payment of a penalty and not for the payment of liquidated damages, in the event of its breach, and that in the absence of proof that defendant in error sustained actual damages, he is not entitled to recover any damages whatever.

The contract is as follows:

"STATE OF ILLINOIS } ss.
COUNTY OF COOK. }

AGREEMENT made this 25th day of October, A. D. 1910, by and between Sigmund Glaser, formerly of Philadelphia, now of Chicago, party of the first part, and Thomas Schrader, of Chicago, Illinois, party of the second part, WITNESSETH:

"THAT, WHEREAS, party of the first part has purchased from party of the second part a certain business located at Number 368 E. 43rd Street in Chicago, Illinois, said business being a retail candy, ice cream and confectionery business, for a consideration of Two Thousand Dollars (\$2,000.00); and

"WHEREAS, a further consideration for the purchase of said business by the party of the first part from the party

of the second part was the agreement on part of the party of the second part not to engage in the same or a similar business for a period of ten (10) years within a certain locality in which the said business is located.

"NOW, THEREFORE, in consideration of the covenants and agreements herein contained, and the payment of One Dollar (\$1.00) from the party of the first part to party of the second part, receipt whereof is hereby acknowledged, party of the second part hereby agrees that he will not for a period of ten years from this date, by himself or in conjunction with others, directly or indirectly, either as manager, agent, owner or employee, engage in the retail ice cream, candy and confectionary business in the City of Chicago, Cook County, Illinois, within a radius of eight (8) block, the central point of which shall be Number 335 East 43rd Street in said city, and the said party of the second part hereby agrees that in case he violates the terms or spirit of this agreement, that party of the first part shall be entitled to the sum of One Thousand Dollars (\$1,000.00) as liquidated damages, which party of the second part agrees to pay in case of such violation.

"It is hereby mutually agreed that the store conducted by party of the second part at number 335 E. 47th Street in Chicago, Illinois, shall be excepted from the prohibited territory above described.

"Witness the hands and seals of the parties aforesaid, this 25th day of October, A. D. 1910.

SIGMUND GLASER (Seal)
THOMAS SCHRAEDER (Seal)."

Defendant in error went into possession of the store building at 335 East 43rd Street, and conducted the business there for two and one-half years, or until April 1, 1913, when his lease of the building expired. About a month prior to the expiration of the lease, he entered into negotiations with the agents of the owner for a renewal or extension of the lease. He was then informed that he might have a lease of the building for the term of one year with the privilege of two additional years, subject to being dispossessed if the building was sold in the meantime. Defendant in error expressed his desire to obtain a lease for three years, but did not then refuse to take a lease upon the terms proposed by the owner's agents. About two weeks before the expiration of the lease defendant in error again interviewed the agents relative to obtaining a lease of the building, with the intention of accepting a lease upon the terms formerly proposed by them if he could not obtain a lease for the term

of three years, and was then informed by said agents that they had leased the building to plaintiff in error. Defendant in error then discontinued the business at said location because he could not obtain a lease of the building, and sold his stock and fixtures at auction. He considered the propriety of re-engaging in business on the South Side, but finally in August, 1913, he engaged in the wholesale confectionery business on the North Side. Immediately after defendant in error vacated said building at the expiration of his lease, on April 1, 1913, plaintiff in error went into possession and conducted there the same business formerly conducted by him.

That plaintiff in error breached the contract does not admit of any doubt. His agreement that he would not for a period of ten years engage in the same business within the territory specified, was still enforceable for seven and one-half years, when he violated it. The contract specifically provides for the payment by plaintiff in error to defendant in error of \$1,000 as liquidated damages in the event of its violation by plaintiff in error. There is nothing within the four corners of the contract that can be availed of by plaintiff in error as indicating any intention of the parties that the damages fixed should be considered as a penalty, in the event of its violation by plaintiff in error. That some damage accrued to defendant in error upon the violation of the contract by plaintiff in error is unquestionable, and it is clear that, in this case, the amount of such damage is not readily ascertainable. The amount fixed by the contract as liquidated damages cannot, under the circumstances, be said to be either oppressive or exorbitant.

The parties having clearly intended the sum named as liquidated damages, defendant in error is entitled thereto

whether his damages be overpaid or underpaid. 1-2-22
Amusement Co. v. Gave, 177 Ill. App., 1950. Radloff v.
Hamm, 193 Ill., 305, relied upon by plaintiff in error, is
clearly distinguishable upon the facts from the present case.

The rule applicable here is stated in Hennessey v.
Metzger, 138 Ill., 505, thus: "Where from the nature of
the contract, the damages cannot be calculated with any degree
of certainty, the stipulated sum will usually be held to be
liquidated damages, where they are so denominated in the
instrument."

The judgment of the Municipal Court is affirmed.

JUDGMENT REVERSED.

ELLEN BARNETT, Administratrix
of the Estate of Thomas E.
Barrett, deceased,

Appellee,

vs.

ANNIE MAROSCHAK, Administratrix of the
Estate of Joseph Maroschak, Deceased.

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

192 I.A. 481

MR. PRESIDING JUSTICE SAGRE
DELIVERED THE OPINION OF THE COURT.

This action in debt on a replevin bond was instituted in the County Court by Ellen Barnett, administratrix of the estate of Thomas E. Barrett, deceased, against Annie Maroschak, administratrix of the estate of Joseph Maroschak, deceased. A trial by the court without a jury resulted in a finding against the defendant for \$1,000 debt and \$1,000 damages, the debt to be satisfied on payment of the damages, and judgment was entered on such finding. The defendant appeals.

The main defense interposed by appellant upon the merits was set forth in her fourth amended plea. A general demurrer interposed to this plea was sustained by the court and appellant, having elected to abide by her said plea, she was defaulted, and a hearing was had upon the assessment of damages.

The plea purports to set up in bar of the action a former adjudication, and avers, in substance, that on May 12, 1910, E. Obatfeld, Yussere Obatfeld and Mrs. E. Obatfeld, as plaintiffs, filed in the Municipal Court of Chicago an action on a contract against Perfect Knitting Mills, a corporation, and Joseph Maroschak, who was the same Joseph Maroschak of whom appellant is administratrix; that said suit was commenced by process filed that day and accompanied by statement of

claim, as follows: Plaintiff's claim is on a replevin bond in the penal sum of \$1,000 dated 22nd day of October, A. D. 1904, executed by the defendants in the case of Perfect Knitting Mills, a corporation, vs. H. Obetfeld, Issued Obetfeld and Mrs. H. Obetfeld, Circuit Court of Cook County, Illinois, Gen. No. 358,829, the breach being the failure of the defendant, Perfect Knitting Mills, a corporation, to make return of the property replevined on the replevin writ in said case and to pay all costs and damages awarded for the wrongful suing out of the replevin; that said statement of claim was accompanied by an affidavit by Issued Obetfeld to the effect that the suit was on the said replevin bond and that there was due \$1,000; that said replevin bond was the same bond on which suit is brought in this present action and the persons named as plaintiffs in said suit in the Municipal Court, to-wit: H. Obetfeld, Issued Obetfeld and Mrs. H. Obetfeld, are the same persons who are the beneficiaries and the persons interested in and the only persons interested in this present suit against appellant; that the said Municipal Court had at that time and still has jurisdiction of such cases; that an alias summons was issued in said cases and the defendants regularly appeared in said cases so that the court obtained jurisdiction of their persons; that on June 21, 1910, the plaintiffs filed in said cause a bill of particulars or amended claim as follows: Barrett for use of Obetfeld, et al. vs. Perfect Knitting Mills, et al., Gen. No. 178, 931. Plaintiffs' claim is for failure to make return of, to-wit: 50 dozen sweaters, 86½ lbs. of yarn to the value of \$1,000, interest at 5% \$300, attorneys' fees, \$250 and court costs, \$3, total, \$1,553; that said claim was verified by the affidavit of said Issued Obetfeld; that afterwards on September 14, 1910, the court made and entered of record an

order in said case as follows: Now come the parties to this cause, and thereupon, on motion of the plaintiff herein, it is ordered by the court that leave be and hereby is granted said plaintiff to amend all records, papers and proceedings in this cause by inserting the name of Sheriff Christopher Straasheim, changing plaintiff's name to read Sheriff Christopher Straasheim, for use of H. Obetfeld, Isador Obetfeld and Mrs. H. Obetfeld. It is further ordered by the court that leave be and hereby is granted said defendants to file a claim of set-off herein instantler. Thereupon the plaintiffs moved the court to strike defendants' claim of set-off filed herein from the files of this cause. Thereupon it is ordered by the court that said motion be entered and that the hearing upon said motion be and the same hereby is postponed until 9:30 a. m. on the 17th day of September, A. D. 1910. The said plea further avers that on September 14, 1910, there was filed in said cause a statement of claim for defendant for -

400 lbs. of varated yarn.....80¢ lb.....\$320.00

210 lbs. of wool yarn.....70¢ lb.....147.00

\$467.00;

that this statement of defense was an affidavit by Isador Halkin, the president of the Perfect Knitting Mills, to the effect that the plaintiffs owed the defendant by a set-off \$520.00; that afterwards on September 19, 1910, the said court made and entered an order in said cause in the words and figures following: Sheriff Christopher Straasheim for use of H. Obetfeld, Isador Obetfeld and Mrs. H. Obetfeld vs. Perfect Knitting Mills, a corporation, and Joseph Kirschak. Now come the parties to this cause for hearing upon the plaintiffs' motion heretofore entered herein to strike defendant's claim of set-off filed herein from the files of this cause; and the court having heard the arguments of counsel

and being fully advised in the premises overruled said motion. Thereupon on motion of the defendants herein it is ordered that a trial by jury in this cause be waived and that this cause be submitted to the court for trial without jury. It is further ordered by the court that leave be and hereby is granted said plaintiffs to file an affidavit of merits herein to defendants' claim of set-off filed herein instantely. Thereupon this cause now comes on in regular course for trial before the court without a jury and the court having heard the evidence and the arguments of counsel, takes this cause under advisement. On the same day there was filed in said cause an amended statement of defendants' claim of set-off for yarn delivered to the plaintiffs and not returned amounting to \$760.04. To this statement of claim was an affidavit of said Isador Nathan, president of the Perfect Knitting Mills that the amount of the defendants' set-off was -

For yarn.....\$761.44

For interest..... 175.82

\$760.04;

that on the same day there was filed in the same case a paper entitled Strassheim, etc., vs. Perfect Knitting Mills et al., No. 17E, 931, being an affidavit by said Isador Obetfeld stating that he was one of the defendants in the set-off and that said defendants have a good defense on the merits to the whole of the plaintiffs' demand and that the defense of the defendants to the set-off is as follows: that he denies that any merchandise was sold and delivered to said defendants by the said plaintiffs in the set-off, that they were not and are not indebted to the said plaintiffs in said set-off or that they had received goods which were not returned to said plaintiffs in said set-off; that thereupon on September 24, 1910, the following proceedings were had and entered of record in said Municipal Court in said cause: Sheriff Christopher

Straussheim for use of M. Obetfeld, Isador Obetfeld and Mrs. M. Obetfeld vs. Perfect Knitting Mills, a corporation, and Joseph Marschak. Now come the parties to this cause and thereupon the court having heretofore heard the evidence and the arguments of counsel in this cause and being fully advised in the premises enters the following finding, to-wit: The court finds the issue against the plaintiffs. Thereupon the plaintiffs move the court for a new trial herein. Whereupon it is ordered by the court that said motion be entered and that the hearing upon said motion be and the same hereby is postponed until 9:30 a. m. on the first day of October, A. D. 1910; that afterwards on October 8, 1910, there was entered of record in said Municipal Court in said cause the following proceedings: Sheriff Christopher Stinausheim for use of M. Obetfeld, I. Obetfeld and Mrs. M. Obetfeld vs. Perfect Knitting Mills, a corporation, and Joseph Marschak. Now come the parties to this cause, and thereupon the plaintiffs move the court to postpone the hearing in this cause upon the said motion heretofore entered herein for a new trial of this cause; which motion is denied by the court. Thereupon this cause now coming on for hearing upon said motion for a new trial of this cause, heretofore entered herein, and the court after hearing the arguments of counsel and being fully advised in the premises, overrules said motion and a new trial of this cause is denied. Thereupon, this cause coming on for further proceeding herein, it is considered by the court that final judgment be entered herein on the finding herein, that the plaintiffs take nothing by this suit and that the defendants have and recover of and from the plaintiffs the costs by the defendants herein expended, and that execution issue therefor. It is further considered by the court that the amount of the stay of execution bond be fixed

at the sum of one hundred and fifty dollars, and that plaintiffs have thirty days in which to file a bill of exceptions herein.

The said plea further avers that the judgment entered by the court in said cause is still in full force, not reversed, set aside, satisfied or made void; that on the trial of said case which resulted in said judgment the plaintiffs to maintain the issues on their part offered in evidence a paper which purported to be a copy of the replevin bond, which is the basis of the action in this present suit and it was admitted by counsel for the defendants that the paper was a true copy of said replevin bond and the paper was received in evidence by the court as said original replevin bond; that the persons for whose benefit the original replevin bond was given were the said M. Obstfeld, leader Obstfeld and Mrs. M. Obstfeld and the said persons conducted said litigation in the Municipal Court through and controlled the same and they were the parties in interest and the only parties in interest in said suit and they are the same persons who are conducting this present litigation as plaintiffs in the name of Ellen Barrett, administratrix of the estate of Thomas E. Barrett, deceased, who was sheriff when the bond was given; that the said Thomas E. Barrett departed his life intestate on March 30, 1906; that the sheriff, Thomas E. Barrett, had and his administratrix, Ellen Barrett, has no personal or beneficial interest in the recovery of said replevin bond.

The right of action upon the replevin bond in question given to Thomas E. Barrett, Sheriff of Cook County, was on the death of said Thomas E. Barrett, vested in his administratrix and not in his successor, Christopher Strassheim. Schott v. Youres, 142 Ill., 233.

If it be conceded that the parties named as such in the action instituted on said replevin bond by Christopher Strassheim, as set up in the plea, were parties to said action, and, therefore, bound by the adjudication in said action as a bar to the prosecution of the present action on said bond properly brought by the administratrix of said Thomas E. Barrett, the plea is vulnerable to attack by demurrer, because it does not aver facts showing that said former adjudication was upon the merits of the case. The plea is to be construed most strongly against the pleader, and for aught that is averred therein, the judgment in the action instituted by Christopher Strassheim, Sheriff, as successor of Thomas E. Barrett, against appellant's intestate, may have been entered against said Strassheim for the reason that he had no right of action upon the replevin bond in question. In such case said judgment would not operate to bar the present suit. In City of Carlisle v. Carlisle Water, Light & Power Co., 90 Ill. App., 38, it was held that a judgment for costs against the assignor of a contract, brought after the assignment, was not a bar to a subsequent suit on the contract by the assignee, because the judgment might well have gone against the assignor upon the ground that such assignor had no right to sue and recover upon the contract. This case on further appeal is reported in 140 Ill., 445. The demurrer to the plea was properly sustained.

The writ of replevin described the property involved as follows: 300 pounds assorted colors yarn; 34 dozen assorted colors and patterns of boys' sweaters; 18 dozen assorted colors and patterns of men's sweaters; 8 dozen assorted colors and patterns of ladies' sweaters; 10 dozen assorted colors and patterns of unfinished assorted sweaters.

The return of the sheriff, as endorsed on said writ is as follows:

"The plaintiff giving security as per bond hereto annexed, I have this 22 day of October, 1904, replevined all of the within described property, and have delivered the same to the Perfect Knitting Mills, as per receipt hereon endorsed, this 22nd day of October, 1904. Served this writ on the within named defendant, H. Obstfeld and Mrs. H. Obstfeld, by reading the same to them this 22nd day of October, 1904. The other within named defendant not found in my county. Thomas A. Barrett, Sheriff, by George Lonke, Deputy."

The original replevin writ with the return of the sheriff thereon appears to have been lost or mislaid and proof was made by a certified copy.

Appellant sought to show that the plaintiff in the replevin suit did not receive from the sheriff all of the property described in the writ, and for that purpose offered proof of the contents of the receipt mentioned in the sheriff's return. Objection was sustained to evidence so offered upon the ground that the return of the sheriff imported verity and was conclusive of the fact that all of the property described in the writ of replevin was delivered to the plaintiff in the replevin suit. Competent proof was offered that the receipt mentioned in the sheriff's return was as follows: "Received of T. A. Barrett, Sheriff of Cook County, all of the within described property except 203 $\frac{1}{2}$ pounds of assorted colors yarn; 17-7/12 dozen assorted colors and patterns of boys' sweaters; 8-2/3 dozen assorted colors and patterns of men's sweaters; 6 $\frac{1}{2}$ dozen assorted colors or patterns of ladies' sweaters."

It will be observed that the return of the sheriff specifically refers to the receipt thereon endorsed for a description of the property returned, and said receipt might therefore properly be considered as a part of the record in connection with said return, for the purpose of ascertaining what property was in fact delivered to the plaintiff. The rights of no third parties had intervened, and the evidence was competent and should have been admitted against appellee.

Heater v. Ricker, 88 Ill., 78; Chicago v. American
Time Sign Co., 108 Ill., 431.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

401 - 20341.

ANNA STAPLETON,

Appellee,

vs.

NATIONAL COUNCIL OF THE KNIGHTS
AND LADIES OF SECURITY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

1921A-182

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellant to recover the amount of a benefit certificate issued to Anna A. Stapleton, the deceased daughter of appellee, wherein a trial by jury in the Superior Court resulted in a verdict and judgment against appellant for \$801.50.

The certificate was issued June 28, 1909, and the insured died May 9, 1910.

Payment of the claim was resisted by appellant upon the sole ground that the insured had falsely stated in her application for the certificate that she was born on August 21, 1890, and was 18 years of age at her last birthday, whereas in truth she was born on August 21, 1891, and was not 18 years of age at the time of making her said application.

The by-laws of appellant provide, inter alia, that its membership shall be composed of white males and females of not less than eighteen, nor over fifty-five years of age when admitted; that no person, nor the beneficiary named in his benefit certificate, who shall make false representations in his application or medical examination for membership as to age shall be entitled to receive any benefits by reason of a benefit certificate having been issued to him; that the subordinate council and its officers are the agents of its members in making application for membership, and

that the National Council shall not be liable for any negligence, irregularity or illegal action by the subordinate council or by any of its officers.

The application recites that the answers and statements therein made are warranted to be true and full, and by the terms of the benefit certificate said application is made a part thereof.

On June 29, 1909, the insured went to the home of her friend, Mary Archer, a member of appellant society, for the purpose of making application for membership in said society, and submitting to a medical examination. Upon that occasion the insured met appellant's medical examiner, Dr. Isabel Hursen, and Julia A. Brady, the deputy of the local council of appellant. The questions appearing upon the application for membership and the medical examination blank were propounded to the insured by Dr. Hursen, who wrote the answers. Appellee, the mother of the insured, was also present a portion of the time, and gave some information relative to the family history of the insured.

Questions Nos. 3 and 4 and the answers thereto, as the same appear in the printed abstract of the record, are as follows:

"3. Where and when born? At Chicago, in the State of Illinois, on the 21st day of August, 1890, and was 18 years of age at last birthday.

"4. (a) Your height? 5 feet 8 inches. (b) Your weight? 165 pounds."

An examination of the original application, as the same appears in the record, discloses that the figures "17" were first written by Dr. Hursen in the answer to the third question, so that it read, "was 17 years of age at last birthday", and that subsequently the figure "8" was written over the figure "7".

Mary Archer testified that in reply to Dr. Hursen's inquiry as to her age, the insured replied she would be eighteen years old on her next birthday in August, and that Dr. Hursen said a matter of a couple of months would be all right, that she (the insured) would go for eighteen years of age; that in answer to inquiries as to her height and weight, the insured said she did not know, and that Dr. Hursen then stated the height and weight, in the application, as near as she thought they were.

Dr. Hursen, called as a witness by appellant, testified that in response to the question regarding her age, the insured said she was eighteen her last birthday; that the insured stated the day and month of her birth, and that witness figured the year herself and put it down; that the insured was a very large strong looking girl, about 5 feet 8 inches in height and weighed over 150 pounds.

Julia A. Brady testified that in response to the question by Dr. Hursen, how old she was the insured said she was eighteen years old.

It is clearly established by the evidence that the application after it was filled out by Dr. Hursen was not read to, or read by, the insured before she signed it. That the whole proceeding was conducted hurriedly and with little regard to accuracy of statement is manifest from a consideration of several incidents disclosed by the evidence. We note particularly that while the application states the height of the insured as being 5 feet, 8 inches, and her weight as being 165 pounds, her height was in fact 5 feet, 11 inches, and her weight was 110 or 115 pounds.

The facts and circumstances in evidence are strongly corroborative of the testimony of appellee's witness, Mary Archer, and we are disposed to conclude that the jury were

warranted in finding against appellant upon the issue of fact involved.

Dr. Hurson, in her capacity as the regular examining physician of appellant, was the agent of appellant and appellant is bound by her acts within the scope of her authority. Johnson v. Royal Neighbors, 233 Ill., 570; Turner v. Modern Woodmen, 186 Ill. App., 404.

It is urged that the court permitted improper cross examination of appellee by her counsel when appellee was called as a witness by appellant. The evidence adduced by such cross examination would have been competent in rebuttal and the court did not abuse its discretion in permitting the witness to testify upon what purported to be cross examination.

The instructions considered as a series state the law with substantial accuracy and the jury could not have been misled thereby. The latter portion of the first instruction, of which most serious complaint is made, is more favorable to appellant than was justified under the issues in the case.

We perceive no substantial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

224 - 10416.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOHN R. BROWN,
Plaintiff in Error.

WARRANT TO

MUNICIPAL COURT

OF CHICAGO.

1921 A. 483

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

Upon information filed in the Municipal Court on August 11, 1913, plaintiff in error was arraigned on the following day, when he entered his plea of not guilty, and having waived trial by jury, was, upon a hearing before the court, found guilty as charged, and was ordered to pay his wife \$10 weekly on Monday of each and every week for the period of one year. Plaintiff in error was also then given leave to enter into recognizance, as provided by statute, and such recognizance in the sum of \$500 was then entered into and approved. Thereafter, on August 23th, following, the court was informed that plaintiff in error had violated the terms of said order, in this, that he had failed to pay the sum of \$10 due and payable August 23th, 1913, whereupon an attachment was ordered to issue against him. An attachment was then issued for the appearance of plaintiff in error forthwith. The attachment does not appear to have been served on plaintiff in error, but the order entered by the court on said August 23th recites that plaintiff in error, as well in his own proper person as by counsel comes into court. This order imports verity and it must be presumed that plaintiff in error was then present in court to answer for his alleged default. The cause then stood for hearing by the court upon the issue whether or not plaintiff in error was in default in the payment of the weekly allowance to his wife.

No further proceedings appear to have been had until March 30, 1914, when the record shows that plaintiff in error in his own proper person came into court, and that by agreement of the parties the hearing of the cause was continued until April 3rd following. Thereafter, on April 3rd, 10th, 23rd and 30th and on May 14th and 21st, following, upon like appearance by plaintiff in error in his own proper person, and by agreement of the parties, the hearing was further continued, the last continuance being to May 22nd, when, what purports to be the final judgment of the court, was entered of record, as follows:

"The State's Attorney now here moves the Court for final judgment on the finding of guilty entered herein said People being represented by the State's Attorney, and said defendant John R. Brown being present in his own proper person as well as represented by counsel, and not saying anything further why judgment of the Court should not now be pronounced against him on the finding of guilty entered herein in this cause, the Court finds that it has jurisdiction of the subject-matter of this cause and of the parties hereto, and it is considered and adjudged by the Court that said defendant John R. Brown is guilty of abandoning without good cause, his wife, and neglecting and refusing to maintain and provide for her.

"And it appearing to the Court that there is an agreement existing between the County of Cook and the City of Chicago, in said County to receive and keep in the House of Correction in said City, all persons who may be sentenced or committed thereto by this court, it is considered, ordered and adjudged that said defendant - John R. Brown - because of said judgment of guilty, be and he is hereby sentenced to confinement at labor in said House of Correction of the City of Chicago, in the County of Cook and State of Illinois, for the term of six months from and after the delivery of the body of said defendant to the Superintendent of said House of Correction. And the Bailiff of this Court is hereby commanded to take the body of said defendant John R. Brown - from the bar of this court and deliver the body of said defendant to the Superintendent of said House of Correction and the Superintendent of said House of Correction is hereby commanded to receive the body of said defendant, John R. Brown - into his custody and confine said defendant at labor in said House of Correction in safe and secure custody for and during said term as aforesaid, and that said defendant be thereafter discharged.

"It is further considered by the Court that said People have and recover of and from said defendant the costs herein and that execution issue therefor.

"The said People being represented here by the State's Attorney, and said defendant - John R. Brown being present in his own proper person as well as represented by counsel,

and said defendant having been convicted herein as shown by the record in this cause, and the Court having heard the evidence introduced on the trial of this cause touching the circumstances and financial ability of said defendant, and having duly regarded said circumstances and financial ability, it is ordered that said defendant be and he is hereby directed and ordered to pay to Anna Brown the wife of said defendant for the use of said wife the sum of Sixty Dollars instanter and Ten Dollars (\$10.00) weekly on Monday of each week until August 12, 1914, the first week beginning with this day, provided leave is given said defendant to pay any sum of money payable hereunder to the Clerk of this court, and in case any of said sums of money are paid to said Clerk, said Clerk is in that case directed to pay the same to the one entitled thereto as herein above provided.

"It is ordered that leave be and it hereby is granted to said defendant to enter into a recognizance with surety or sureties as may be approved by this Court or a Judge thereof, said recognizance to be conditioned according to law in cases of this character, and to be in the sum of Seven Hundred and 20/100 Dollars (\$700.00) and payable to the People of the State of Illinois, for the use of Anna Brown.

"And in case said defendant shall enter into such recognizance, and the same shall be approved by this court or a judge thereof, in that case it is ordered that said defendant be released from custody for the space of one year from this date."

Section 1 of an Act relating to the Abandonment of Wife or Children, after defining the offenses, fixing the punishment and prescribing the procedure, provides as follows:

"If the Court be satisfied by information and due proof, under oath, that at any time during the year the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original indictment, or sentence him or her under the original conviction, as the case may be."

As the writ of attachment which was issued against plaintiff in error was never served upon him, his appearance in court was not referable to the command in said writ, but rather to the provision of his recognizance to make his "personal appearance in court whenever ordered to do so within a year." It will be observed that the final order or judgment above set forth and which is the only order or judgment here involved contains no finding or recital that the court was satisfied by information and due proof, under oath, that plaintiff in error had violated the terms of the

prior order whereby he was required to pay to his wife \$10 weekly. Being a criminal statute, it is to be strictly construed, and we regard it as essential to the validity of the judgment here sought to be entered that it should contain the recital of a finding as above indicated.

It may be suggested that it appears upon the face of the record either that plaintiff in error had made some of the payments required by the original order, or that the court had, in the exercise of its discretion, changed the amount that plaintiff in error was required to pay, because it is apparent that if plaintiff in error had made no payments whatever, a much larger amount than \$60 would, in the absence of any change, have been due and payable on May 28, 1914. If any change was made in the amount plaintiff in error was required to pay by the order first entered, the record should so show.

In view of the fact that the appearance in court of plaintiff in error, whereby jurisdiction was acquired of his person, was not in response to the writ of attachment which was issued against him, we do not deem it necessary to determine whether a proceeding in attachment may properly be invoked in compulsion or punishment of a defendant who has made default in payments required to be made in such a case, or whether the proper proceeding is by forfeiture of the recognizance and enforcement thereof by execution, as provided by the statute.

The judgment in other respects is in conformity with the provisions of section 1 of the statute in question.

As there is no assignment of error which questions the proceedings prior to the entry of the final judgment, it is unnecessary to remand the cause for a new trial, but the judgment will be reversed and the cause remanded to the Municipal Court with leave to defendant in error to there move for a proper judgment.

REVERSED AND REMANDED
WITH DIRECTIONS.

877 - 20608.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HARRY MARTIN,

Plaintiff in Error,

NOV 19 1914

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT

192 I.A. 485

An information filed in the Municipal Court charges

that on May 25, 1914, plaintiff in error "was an idle and dissolute person; was a pilferer; did habitually neglect his employment and calling and did not provide for himself; was an idle and dissolute person and neglected all lawful business and did habitually spend his time by frequenting houses of ill-fame, and tippling shops, without giving a good account of himself; is known to be a thief, or pickpocket, having no lawful means of support, and was habitually found prowling around places of public amusement, stores, shops or crowded thoroughfares, cars, tippling shops, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of Illinois." Plaintiff in error entered his plea of not guilty and upon a trial by jury was found guilty of being a vagabond as charged. Some judgment of conviction, the nature of which is not disclosed by the abstract, was entered upon the verdict, and this writ of error is prosecuted to reverse such judgment. The information substantially follows the language of the statute. Section 370, Chap. 38, R. S. 1913. No objection to the information, either as to form or substance, was interposed in the court below and no bill of particulars was requested to be filed. The information is sufficient as against attack after verdict.

It is urged that the verdict is not supported by the evidence.

Martin Hughes, a sergeant of police, testified that he had known plaintiff in error a little over two years; that plaintiff in error had "hung out" at a cigar store at 22nd street and Wabash Avenue for the last year; that he had seen plaintiff in error around there every night for the last year, as late as 3, 4 and 5 o'clock in the morning; that the place was frequented by pimps and pickpockets; that the associates of plaintiff in error were pimps and pickpockets; that plaintiff in error was a pickpocket; that he never knew plaintiff in error to do any work, except about two months in the fall of 1913, when he managed a saloon and cafe, or was a waiter, or was in charge of waiters there.

Police officer Carey and detective sergeant Pierrot testified to substantially the same facts, except that the last named witness, who was on duty from 3 o'clock in the morning to 7 o'clock in the evening, testified that he saw plaintiff in error in the same cigar store nearly every day between 3 o'clock in the afternoon and 7 o'clock in the evening.

Plaintiff in error made a pretense of showing that he had been engaged in the restaurant business with one, Lipchitz, at 1938 Archer Avenue, since April 1, 1914, and that said business provided him with a lawful means of support, but the testimony of himself and his witness, Lipchitz, is, on its face, so incredible and inconsistent with the established facts and circumstances in evidence, that the jury were fully justified in wholly discrediting the same. Plaintiff in error does not deny that he was and is a pickpocket.

It is said generally that the trial court improperly

admitted incompetent and illegal evidence. If any such evidence was admitted by the court, it was, in so far as the abstract of the record discloses, so admitted without any objection by plaintiff in error. Questions relating to the competency of evidence can not be raised for the first time in a court of review.

But one objection was interposed by plaintiff in error to the oral instructions given to the jury, and thereupon the court gave an additional instruction which fully met the objection interposed.

The State having shown that plaintiff in error had no employment and no visible lawful means of support, if he had such means of support, it was a fact peculiarly within his knowledge, and in the absence of any credible proof by him of such fact, the jury were warranted in finding that he had no lawful means of support. People v. O'Keefe, 178 Ill. App., 86. The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

21176.

JOSEPH R. DINN AND GEORGE EIGHT,

vs.

B. K. BLOCK, doing business as THE
EMPIRE DISTILLERY COMPANY; THE NOTE
AND BOND AND MORTGAGE COMPANY OF
NEW YORK, a corporation, and JAMES
J. CHRYSLER, Sheriff of the United States
Court of Chicago,

Defendants.

On Appeal of
THE NOTE, BOND AND MORTGAGE COMPANY OF
NEW YORK, a corporation,

Appellant.

APPEAL FROM

INTERLOCUTORY

ORDER DENYING

MOOTION TO DISSOLVE

INJUNCTION BY

CIRCUIT COURT,

COOK COUNTY.

1921 A. 486

MR. PRESIDING JUSTICE BAILEY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by The Note, Bond & Mortgage Company of New York from an interlocutory order of the Circuit Court overruling appellant's motion to dissolve a temporary injunction.

The bill alleges that appellees on June 3, 1911, were induced to execute a certain judgment note or notes for various sums of money, all of which notes were made payable to the Empire Distillery Company, and one of which notes was in the sum of \$233.85, - the amount of the remainder of the said notes being to appellees unknown, but to the best of the knowledge of appellees being of the sum of seventy-five dollars (\$75.00) each; that the execution of said notes was obtained by and through circumvention and misrepresentation, with the right of cancellation and revocation of each of said notes, in the makers thereof; that on the above date, B. K. Block and Newman, agents for the Empire Distillery Company, called at the place of business of appellees and represented to them that if they would execute to the said Empire Distillery Company the above mentioned notes, that

upon the execution of said notes certain barrels of whiskey which were represented then and there by the said Block, to be the property of the defendant, the Empire Distillery Company, free from all incumbrance, would be delivered to appellees; that appellees then and there told said Block and Newman that they would execute said notes only upon the condition and understanding that said notes would be equivalent to the delivery of the whiskey to appellees as represented by said Block and Newman, and that appellees could on the following Monday, if then and there being on a Saturday afternoon, cancel and revoke said notes, if the representations of said Block and Newman were found to be false or untrue; that said Block and Newman told appellees to execute said notes and that said Block and Newman acting for the Empire Distillery Company would give appellees two days in which to cancel and revoke said notes if said representations so made by said Block and Newman were found to be other than as so made by them; that said Block and Newman told appellees that said Block was the only one who was authorized to make out said notes; that he was about to leave the city that same night, but if appellees would execute said notes, he would send his agent, Newman, out to appellees' place of business on the Monday following, at which time appellees would have the privilege and right to cancel said contract and notes and have the same delivered up to them by his said agent Newman, and that appellees, relying upon said promises, executed said notes; that said Newman called at appellees' place of business on the Monday following, and appellees then and there notified said Newman of their election to cancel said notes and contract and demanded that said Newman return said notes and the contract which had been executed therewith.

The bill further alleges that said Newman, in violation of the terms of his principal the said Block and the said Empire Distillery Company, refused to deliver to appellees the said notes and contract; that the execution of each and every one of said notes by appellees was and is a fraud on the rights of appellees; that said notes do not represent any legal obligation on the part of appellees to the Empire Distillery Company or either of the other parties against appellees and that appellees obtained nothing in the execution of said notes from the Empire Distillery Company or either of the other parties; that at the time of the execution of said notes, certain certificates were issued by the Empire Distillery Company and B. K. Block and were delivered to appellees by said Block, which said certificates appellees tendered back to said Newman on the date when appellees notified him of their election to revoke the contract and cancel said notes; that said Newman requested appellees to hold the certificates until the return of said Block, and refused to accept the same; that the said Block and Newman, his agent, have refused and failed to visit the place of business of appellees at any time since that last mentioned and that appellees have caused the said certificates to be returned to said Block by registered United States Mail; that said Block and the Empire Distillery Company as a fraud upon the rights of appellees have transferred, assigned and conveyed, as appellees are informed and believe, all of the said notes to the Note, Bond & Mortgage Company, a corporation of New York; that said Note, Bond and Mortgage Company of New York has caused to be entered in the Municipal Court of the City of Chicago, a confession of judgment upon one note in the sum of \$233.85, interest and attorney's fees, amounting in all to the sum of \$261.85, and execution for the collection

of said judgment has been placed in the hands of Anton J. Cersak, Bailiff of the Municipal Court of Chicago; that the certificates mentioned are of no value - that they represent no value of any kind or nature, and are entirely within the control of the said Empire Distillery Company and said Block, regardless of who may have possession of the same, and that no whiskey can or may be withdrawn by or through them without the consent of the said Empire Distillery Company and said Block; that said Cersak, Bailiff of the Municipal Court, has demanded of appellees payment of the moneys so due on said judgment above mentioned and has threatened to levy upon the goods and chattels of appellees to satisfy said judgment and execution, to the great injury and wrong of appellees.

The bill prays that said parties be restrained from further proceeding under and by virtue of any execution arising out of said Municipal Court under and by virtue of the judgment of confession entered on said note for \$225.85, or any other note growing out of the execution of said notes by appellees to said Empire Distillery Company and said Block, and that said Empire Distillery Company, B. K. Block and the Note, Bond & Mortgage Company of New York be restrained from confessing judgment on any of the remainder of said notes or from transferring any of said notes to any other person or persons.

The injunction order substantially follows the prayer of the bill.

There is no allegation in the bill that appellant was and is not a holder in due course of the notes in question, and it is insisted, therefore, that the presumption conclusively obtains that appellant was and is such holder in due course.

Section 52 of the Negotiable Instrument Act defines a holder in due course as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 59 of said act provides as follows:

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Section 55 of said act is as follows:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

The cases cited and relied upon by appellant are cases decided prior to the enactment of the existing law relating to negotiable instruments, or decided with reference to such instruments made prior to the enactment of said law. The facts alleged in the bill sufficiently show that the title of the Empire Distillery Company to the notes in question was defective, within the meaning of section 55 above quoted, when said notes were negotiated to appellant, and thereupon, under the provisions of section 59 above quoted, the burden was cast upon appellant to prove that it or some person under whom it claims acquired the title thereto as a holder in due course.

The case has been here presented, in part, upon erroneous theories, which wholly ignore any application to the case of the several sections above quoted of the existing act in relation to Negotiable Instruments.

Undoubtedly, if appellant is the holder of said notes in due course, the fraud and circumvention alleged in the bill, and which relates merely to the consideration, is not available to appellees to defeat a recovery by appellant.

The order is affirmed.

ORDER AFFIRMED.

LYLE D. TAYLOR,
 Appellant,
 vs.
 ARTHUR L. CURREY,
 Appellee.

APPEAL FROM
 CIRCUIT COURT,
 COOK COUNTY.

PER CURIAM.

192 I.A. 502

The declaration in this case is the common
 counts in assumpsit. A bill of particulars was filed by
 appellant stating, in substance, that his claim was for \$1,500
 by him to appellee for fifteen shares of the capital stock of
 the South Farm Company, a corporation; that said stock was
 sold to appellant by appellee by means of certain false and
 fraudulent representations as to the value of said stock, the
 corporate organization of said company, the assets and business
 of said company and as to the ownership of and the sub-
 scriptions to the capital stock of said company, upon all of
 which representations the plaintiff relied, etc. A credit
 of ninety dollars was given appellee for an alleged dividend
 paid appellant on the stock purchased by him. The general
 issue was filed by appellee. After appellant had introduced
 all his evidence in a trial before the court, a jury having
 been waived, appellee moved the court to exclude the evidence
 and to render judgment in his favor. The court at first de-
 nied the motion. Appellee declined to offer any evidence
 whatever and rested his case upon appellant's evidence. After
 further arguments and the submission of propositions of law
 by both parties the court sustained said motion and rendered
 judgment against appellant.

The evidence in the record shows without question
 that in the summer or fall of 1907, appellee entered into
 negotiations with William H. Smith, president of the San Luis

Land and Cattle Company, a Nebraska corporation, with reference to the purchase from said company by the South Farm Company, a New Jersey Company, of one hundred acres of land, the same being a part of a large tract of land situated in the Republic of Mexico and then owned by the San Luis Land and Cattle Company. The one hundred acres of land after becoming the property of the South Farm Company was by arrangement of appellee and said Smith to be leased by the South Farm Company to the San Luis Land and Cattle Company for the term of eleven years, beginning with March 1, 1908, at a rental of \$1,000 for the first year, \$1,300 for the second year, and \$8,500 per year for the last nine years, and the purchase price to be paid for said land by the South Farm Company was \$15,500. The deed to the hundred acres of land was not made direct to the South Farm Company, but by the arrangement of appellee with Mr. Smith the deed was made to one John W. Dutton, a man whom Mr. Smith had never seen or known, and whose identity or whereabouts is not disclosed by any evidence in the record. The unknown Dutton in turn made the lease aforesaid to the San Luis Land and Cattle Company. The minutes of the proceedings of the stockholders and directors of the South Farm Company at its meeting, October 31, 1907, in evidence by agreement, shows a resolution adopted that that company accept the offer of John W. Dutton to sell to it said land and his interest in the said lease, and that the same is necessary for the business of the South Farm Company, the resolution describing the land and reciting the terms of the lease without stating the consideration mentioned in the deed to Dutton. The resolution further recites that the president and secretary of the South Farm Company are thereby directed and empowered to purchase all the rights of said Dutton in said contract for \$25,000 to be paid to him or to the San Luis Land and Cattle Company, as he may direct in consideration that said Dutton shall cause said

company to execute a warranty deed to said South Farm Company and arrange for the latter company to lease said one hundred acres of land to the San Luis Land and Cattle Company for the same time and upon the same terms named in the said lease thereof by said Dutton to the San Luis Land and Cattle Company; and in further consideration that said Dutton should give his notes for \$300 and \$200 without interest to the South Farm Company, due respectively March 1, 1908, and March 1, 1918, secured by ten shares of capital stock of said latter company, thus making an income to the South Farm Company of \$1,500 per year for the first two years, and enabling it to pay 6% dividends for those two years and 53-1/3 % dividends for the next nine years thereafter.

The South Farm Company was organized in the fall of 1907 by appellee and others with a capital stock of \$25,000, with its main office in Chicago, and for the purpose of purchasing said land, and of leasing the same to the San Luis Land and Cattle Company. It never received any moneys, except about \$14,500 that was collected by the sale of its stock and about \$68.00 that was paid in by some of the stockholders to meet some necessary expenses of the company. The stockholders have not received any dividends, except for the first year which were paid by the said Dutton on his notes. No rents were ever paid by the San Luis Land and Cattle Company, and that Company was ^{re-}organized into a Maine corporation with increased capital stock by appellee and one Mr. Allen, who are lawyers composing the firm of Currey & Allen, and since that reorganization the entire business of the corporation has become involved in litigation and the question of the identity of the corporations is now pending before the courts. The said firm of Currey & Allen were the attorneys for that company for years prior to the organization of the

South Farm Company. It also appears that appellee largely dictated the minutes of the stockholders and directors of the South Farm Company, and was thoroughly familiar with all its affairs and the purposes of its organization. It was officered by women. Appellee sold stock in this company, placed the money in the hands of Miss Hammond, its treasurer, and shortly before it was organized showed her the possibilities of the scheme and recommended that she should take it up and handle it effectively, especially among young women who were earning their livelihood in down town employments, and it was so handled, and many women employees thereby became victims of the scheme. He stated to her that the land would be purchased for \$25,000, that it would be to her advantage to go into it, and that he had investigated it thoroughly. Only \$15,500 was paid for the land to the San Luis Land and Cattle Company and it was paid by the South Farm Company, and not by Dutton, \$10,500 in cash and the rest in stock in the South Farm Company. Dutton received \$8,500 of said stock, evidently promotion profits for himself, appellee and others. Appellee never became a stockholder of the South Farm Company, except as a holder of eighteen shares for which he paid nothing, and which he sold and distributed to seven women in small amounts at par and retained the money as his own.

Appellant is a court stenographer by occupation and, while employed by appellee in a lucrative job to report the proceedings in the Marshall Field inheritance tax appraisalment, in October, 1907, was induced by appellee to purchase from him fifteen shares of the capital stock of the South Farm Company. Appellant paid appellee \$1,500 for the stock by giving to him his note in that sum payable to the order of appellant at the office of appellee one year after date and endorsed by appellant. Appellee afterwards mailed the certificate of stock so sold to appellant with a blank receipt for appellant to sign and return

to appellee. After the notes became due appellant paid it by a check payable to appellee, who after collecting the money paid it to the South Farm Company, but appellant had no knowledge of the money being paid over to the corporation until after this suit was brought. To induce appellant to buy said stock appellee said to him: "I am organizing a company to buy one hundred acres of land in Mexico adjacent to the property owned by the San Luis Land and Cattle Company, and after we buy the land we shall lease it to the San Luis Land and Cattle Company at the rental which will pay the stockholders of the South Farm Company 33-1/3% after the expiration of the first two years of the lease." Appellant replied to appellee that it looked like a risky proposition and asked him why the San Luis Land and Cattle Company did not buy the land themselves instead of leasing it at the big rental of 33-1/3%. Appellee replied: "It is a good thing. I have looked into it thoroughly and I know it is a good thing. I can assure you that everything is all right, and the money is sure to come. While the company is a good company and quoted in Bradstreet and Dunn's anywhere from three-fourths of a million to a million dollars, that at present it is a little short of money and did not like to take \$30,000 to buy the land. It would much prefer to have some one buy it and lease it to them. After they get the 100 acres of land under cultivation and producing sugar cane, they would make enormous profits on it and could well afford to pay 33-1/3 per cent."

Appellant asked appellee if he was going to put any of his money into the stock of the South Farm Company, and he assured appellant that he was, and further explained to appellant that he would get six per cent. dividends on his investment for the first two years, and went into details as to the terms of the lease to the San Luis Land and Cattle Company. Appellee

also represented to him that the entire sum of \$15,000 obtained by the South Farm Company by the sale of its stock which was to be sold at par was to be paid for the land, and that there were to be no promotion profits, and that the land spoken of was then under lease to the San Luis Land and Cattle Company on the terms aforesaid, and that the South Farm Company had been organized by himself for the purpose of purchasing the land so leased; that after the end of the lease the stockholders would have their money back more than three times, and would then be the absolute owners of the land to renew said lease or make any other arrangements therewith they saw fit; that the lease had been carefully drawn, submitted to legal authority, pronounced binding on the lessee, and that in case the lessee got into financial difficulties, the lease was in the nature of a mortgage, and that the stockholders of the South Farm Company would be preferred creditors and would be the first creditors paid by the lessee. Appellant replied implicitly on the representations made to him by appellee, as he had great confidence in him and their relations had been very friendly, and he made no independent investigation of the matters himself and had no opportunity to do so until shortly before this suit. He received a 8% dividend or ninety dollars for the first year which appears to have been paid to some of the stockholders who had actually paid for their stock, and paid only from the \$700 owed by the unknown Tutor. No dividends having been paid the second year, appellant and others began to inquire into the matters and to hold meetings therefor, and to investigate the books in the hands of Miss Hammond, president of the company. Appellee upbraided appellant for bothering Miss Hammond and said to him: "Whenever you want to find out anything about this company you come to me. I sold you this stock and I am responsible for it. Now quit calling up

Miss Hammond and bothering her."

As soon as appellant learned that there was no hope of realizing further on his stock from the corporation, and that he had been made a victim by fraud and deceit, he tendered the certificate of stock in question back to appellee and \$90.00 in gold coin of the United States and demanded the return of his \$1,300 paid for said stock, which demand appellee after taking a week's time to consider declined to meet. This suit then followed, and on the trial thereof the stock was again tendered to appellee by appellant.

It appears from an opinion of the court found in the record that the lower court reached about the same conclusion from the facts above set forth that we have, but held that appellant could not recover under the common count for money had and received, (1) because the transaction of purchasing the stock was with appellee as an agent of the South Farm Company ^{not} and with him as a principal; (2) that appellee had paid the money over to said corporation and had no moneys of appellant in his hands. The court in written propositions held the law to be as stated in his opinion.

Where one purchases stocks or other articles because of fraudulent misrepresentations, he has a right to rescind the contract, if he acts promptly after discovering the fraud, and when he exercises his right to rescind properly he may recover the consideration money in an action of account for money had and received. Peabody v. Chapin, 44 Pa. St. (3 Wright), 9; Byard v. Helms, 33 N. J. Law (4 Vroom), 115; Lava v. McElroy, 103 Ill. App., 494; Barton v. Clifford, 33 Ill., 87.

In this case it is no defense that appellee acted as the agent of the South Farm Company, even if it be conceded that he did so act. An agent is liable to third persons for injury resulting to them from his misfeasance or nonfeasance.

Such agent is liable to third persons for conversion, and for fraud and deceit. It is no defense that he acted as agent or by the direction of another, or that he received no benefit from his wrong, or that he had paid the proceeds of his wrong to his principal. 31 Cyc., 1520, 1523; Amer. & Eng. Ency. of Law, Vol. 1, 1132 to 1137; Sturges v. Birley, 86 Ill. App., 409; Shipyard v. Underwood, 55 Ill., 470; Read v. Peterson, 41 Ill., 200; Allen v. Hartfield, 76 Ill., 358.

The action for money had and received is an equitable one and lies for money had and received by the defendant, which in equity and good conscience he should not retain, but should pay to the plaintiff. The right of recovery depends upon two things: First, that the defendant has actually received the money; and, second, that in equity and good conscience he should pay it to the plaintiff. The law in such case implies a promise to pay, although there is no privity between the parties. Schodde v. Schaefer, 124 Ill. App., 410, and cases therein cited. What the defendant has done with the money is of no consequence in all such cases where the money has been fraudulently obtained from the plaintiff, or wrongfully and fraudulently paid to another though rightfully received for the plaintiff. Appellant is not required to hunt up and sue the parties who actually have his money, and he could not find it in the hands of the South Farm Company, if he sued that corporation as suggested by appellee.

The false and fraudulent representations that deceived and damaged appellant were as to then existing or past facts, and not mere promises or expressions of opinion as to what would be at some future time, as contended by appellee. Murray v. Tolman, 163 Ill., 417, is a case in which the false representations were very similar to those in the instant case.

They were knowingly made with intent to deceive, as the evidence clearly shows. This appears from appellee's intentional concealment, as well as his misrepresentations of the facts that there were to be no promotion profits, that all the stock was to be sold at par, that all the proceeds thereof were to be paid for the purchase of the land, that the land did not belong to the San Luis Land and Cattle Company, and also from his scheme of double transfers and leases employed to cover up the real facts, the selection of a class of persons to whom the stock should be sold that had little or no experience in such investments, and finally in his misstatement of the legal effects of the lease in securing to the stockholders a preference over other creditors in case the lessee failed. It is not believable that appellant and women employed would have fallen as victims of the scheme had they known the real facts and that the lessee of the land was actually selling the land for \$10,500, and agreeing to pay for nine years of its lease more than 51½ per cent. of its selling price for the land yearly as rental instead of 33-1/3 per cent. Appellant relied on appellee's representations with implicit confidence and he is not chargeable with negligence in so doing, as he had no means of further investigation at that time. Leonard v. Springer, 197 Ill., 532.

For the errors indicated, the judgment of the lower court is reversed and the cause is remanded.

REVERSED AND REMANDED.

100 - 20010

CORPORATED ELECTRIC SIGN
COMPANY, a corporation,
Defendant in Error,

vs.

JOSEPH PRICE,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921A. 510

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment under review was for \$185, the agreed price for an electric sign sold by said company to said Price under a written contract. Price stopped the company's men from setting the sign in place, and thereupon it was returned to be made in accordance with a supplemental contract requiring some changes unnecessary to mention.

One of the provisions of the supplemental contract was that Price was to inspect and approve the sign before it was hung. When the company's men attempted to set it up the second time, they were again stopped by Price from finishing the undertaking. [The real questions of fact were whether there was a substantial compliance by the company with the terms of its contract, and whether Price prevented complete performance thereof.

We shall not review the evidence in detail. We think it was sufficient to establish the affirmative of both propositions, and that plaintiff was entitled to recover.] The evidence tends to show that Price directed the sign to be hung after a request was made of him to inspect it [thus waiving the right to inspect accorded by the contract, and the right to urge non-acceptance before the sign was hung.]

The evidence also tends to show that all was done that is usually done in such work before setting up the sign and that plaintiff was ready and willing to do the things that are done after

the sign is set in place, but that Price, without good reason, prevented it from doing so. There seems to have been a substantial compliance with the contract and a performance in all matters except so far as prevented by Price himself, as to which he stands in no position to complain.

The point is made that the contracts were not offered in evidence. When asked for identification, counsel for plaintiff said, "I want to submit them to the jury." One of them was read in full to the jury and the substance of the other stated, and both parties to the suit treated them as in evidence. The point is a technical one and without merit. Complaint is also made that the court made prejudicial remarks. We do not so regard them, and we find ^{good} no reason for disturbing the verdict and judgment.

AFFIRMED.

CHARLES TURGRIMSON,
Defendant in Error,
vs.
J. P. CEEBURG PIANO COMPANY,
a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1901 A. 512

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record before us discloses the following undisputed facts:

X One Vanuzos purchased a piano from said piano company and gave back a purchase price chattel mortgage thereon, which he signed and authorized one Lassen to acknowledge. The acknowledgment was made by Lassen and the mortgage was filed for record April 27, 1913. On February 14, 1914, Vanuzos executed another mortgage on the piano to plaintiff Turgrimson, which was recorded the same day. Under the powers contained in the first mortgage, the piano company secured possession of the piano on a replevin writ sued out of the Municipal Court, March 17, 1914. On the following day, Turgrimson made a demand on the piano company for possession of the piano, which was refused, and thereupon he brought a replevin suit for the piano, joining therein a count in trover. On the hearing a witness for defendant fixed the value of the piano at \$300, and on plaintiff's action the court directed a verdict for that sum.

Defendant's claim to the right of possession was based on its mortgage which the court refused to admit in evidence because it was not properly acknowledged. The ruling was correct. We held in case No. 18033, E. E. Kimball Company, a corporation, v. Polakow et al., (opinion filed December 24, 1914) that as to third persons a chattel mortgage, signed by the owner of the property

and acknowledged by his attorney in fact, was invalid. That we there said on that subject need not be repeated here.

The only other question bearing on the court's action in directing the verdict is whether it erred in not submitting to the jury the question of good or bad faith in the execution of the Turgrimson mortgage. The evidence relied upon to present such an issue merely tended to show that the loan secured by the mortgage was tainted with usury; but, if so, that did not render the mortgage invalid. Turgrimson could collect the principal of the debt and enforce the mortgage to that extent, and that was purely a question between him and Manages.

The piano company's mortgage being invalid as to Turgrimson, a subsequent mortgagee, whose mortgage was valid, the court, on the undisputed facts, was authorized in directing the verdict. The judgment thereon will be affirmed.

AFFIRMED.

THE CITY OF CHICAGO,
Defendant in Error,

vs.

ALBERT STEADY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921 A. 514

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was prosecuted, found guilty, and fined \$200, on a trial before the court without a jury (which was waived) upon a complaint charging him with violation of Section 2012 of the Chicago Code of 1911.

The only offense charged in the complaint, which there was any attempt to prove, was that Steady was "known to be a pick-pocket and was found lounging in and prowling and loitering about a * * * car * * * public conveyance * * * and was unable to give reasonable excuse for being so found in violation of Section 2012 of the Chicago Code of 1911."

The only testimony in support of said complaint was by the police officer who made the arrest. His testimony, on direct examination, was as follows: "On the 17th day of April, A. D. 1914, at six o'clock A. M., I saw the defendant, Albert Steady, at the corner of 12th and Halsted streets, getting on a street car going west on 12th street. I know him as a pickpocket and that he was associating with pickpockets, and I got into the street car and placed him under arrest. I arrested him on suspicion that he was trying to pick someone's pocket in the street car."

On cross-examination he testified that he did not see Steady doing anything on the car or at the time he made the arrest. With this testimony the city rested, and the court should have dismissed the prosecution for want of sufficient evidence to sustain the averments of the complaint. Defendant, however, took the witness-stand and admitted that he was on the car in question,

and testified that he was going home; that he was a salesman. In answer to the question put by his counsel, "Are you a pickpocket?" he said, "No, sir, I am working." Defendant then rested and the city's counsel asked, "Are you working now?" and he answered, "No, I have been out of work for a couple of months," and the city again rested. This was all the testimony.

The order of the court further provided for imprisonment in the House of Correction, on failure to pay the fine, not to exceed six months.

There was no proof or attempt to prove that defendant was called on in any way to give "and was unable to give a reasonable excuse" for being in the car. Without proof of it there was no complete offense as charged in the complaint, the elements of which were (1) that he was known to be a pickpocket, (2) was loitering in the car, and (3) was unable to give a reasonable excuse for being found there. If we assume the evidence was sufficient to show that the defendant was known to be a pickpocket, yet there was no evidence tending to prove either one of the other elements. It is not impossible that one known to be a pickpocket may enter a public conveyance for the lawful purpose of riding home. If so, the mere fact that he is in the car does not constitute "loitering" in it, or "prowling and loitering about" it, and we do not think an officer or anyone else is entitled to eject him therefrom merely on suspicion that he enters the car for an unlawful purpose. An officer may arrest upon reasonable suspicion that one has committed an offense, but not on suspicion that one may commit an offense. But if there had been in the fact of the known reputation of the defendant and the circumstances of his entering the car, sufficient to justify the officer's suspicion, still, to sustain the offense charged, the officer should have required a reasonable excuse for his being on the car before attempting to arrest him on mere suspicion. The evidence is insufficient to support the complaint, and, therefore, the judgment will be reversed with a find-

ing of not guilty by this court.

We reserved to the hearing a motion to strike from the record "the statement of facts." The document, so-called, should not be so classified. Defendant was permitted by order of court to file either a statement of facts or a stenographic report. The document filed appears to be the latter, and purports to contain the evidence and proceedings at the trial, and is certified to as "a true and correct statement of facts and of all the evidence submitted and heard in the above entitled cause." True, the document is not a "statement of facts," and the certification does not make it such. But that part of the certification, referring to it as such, may be treated as surplusage; for the certification that the instrument contains all the evidence submitted and heard is sufficient to bring it before us for review. The document so certified is equivalent to a stenographic report, as we have frequently decided. (Samuel v. Life Assn. of Am., 162 Ill. App. 245; Herschowitz v. Royal Tailors, 154 id. 10; Lewis v. Richheimer & Co., 157 id. 321; Cocks Brewing Co. v. Mitchell, 177 id. 372.)

Another ground urged in support of the motion is that the document was not certified to by the trial judge, and that the certificate is not in form to indicate the right of another judge to make the certificate.

The placita shows that the trial was had before Judge Bowles, a judge of the City Court of Chicago Heights, holding a branch of the Municipal Court of Chicago at the request of the judges of the latter court.

The certificate is signed by Charles N. Goodnow, Judge of the Municipal Court, and appended thereto are the words, "in the absence of Judge Bowles, who is not acting as judge of this court at this time."

It would have been better had the information conveyed by what is so appended to the judge's signature, been set forth in

-3-

the body of the certificate or in some other form to show that the judge properly exercised the authority conferred by Sec. 81 of the practice act. But inasmuch as the judge had the power to sign the report on proof of the fact that Judge Reeves was no longer holding court in Chicago, we must presume, in the absence of any showing to the contrary or of any objection in the record to his action, which was presumably had on a motion and due notice thereof, that the judge in so certifying acted upon competent proof of the disability of the trial judge. The presumption of regularity of proceedings will obtain unless the contrary is affirmatively shown by the record. (Pacsis v. Drainage District, 238 Ill. 278.)

The motion will be denied and the judgment reversed.

REVERSED.

40017

FINAL JUDGMENT.

We find Albert Steady, plaintiff in error, not guilty of violating Section 2025 of the Chicago Code of 1911.

JOHN HERON,
Defendant in Error,
vs.
MINNIE A. ROBERTS,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921 A. 516

MR. PRESIDING JUSTICE BARNER DELIVERED THE OPINION OF THE COURT.

The action below was based on the claim that John Heron, the plaintiff therein, had an attorney's lien for \$100 on a judgment obtained by James E. Tate against Minnie C. Roberts, the defendant therein, and that she paid \$1000 in satisfaction of said judgment after notice of his lien. Her defense was that she did not make such payment in her personal capacity but as executrix of the last will and testament of James Corlett, deceased, and under order of the Probate Court, and had no knowledge of Heron's contractual relations with Tate.

The finding and judgment of the court were for plaintiff, and the assignments of error are that the finding and judgment were against both law and the evidence. We think they are well taken; first, because the evidence clearly shows that defendant acted under order of court in the capacity of executrix in paying said sum, and, second, because it does not clearly appear from the record that plaintiff had a lien on the fund from which the payment was made.

The evidence disclosed the following facts: James E. Tate obtained a judgment against defendant for \$850. Later he also obtained a decree in chancery setting aside a deed from defendant to her father, James Corlett, of certain real estate, and authorizing a sale thereof under an execution upon said judgment, and directing payment from the proceeds of sale, first of \$1000 to said Corlett, and then the judgment of \$850 to Tate, unless the latter

sum with interest was paid by some of the parties defendant to said decree. Nothing appears to have been done under said decree, but later Corlett died, leaving a will appointing defendant as his executrix. Pursuant to an order of the Probate Court, defendant, as such executrix, sold said real estate for payment of the debts of Corlett's estate.

The order required, first, the payment of certain liens, including the lien of Tate's judgment as established by said decree, then the payment of debts of the said estate. The amount of said lien was fixed in said order at \$1000 and defendant paid the same from the proceeds of the sale as directed. //

The purpose of said payment was to remove a lien on the Corlett estate. While it also operated at the same time to satisfy a judgment against defendant Roberts, the legal effect was no different than if somebody else had been executrix. Had some one else been executrix, no one would contend that the payment would render defendant, Minnie C. Roberts, personally liable for the attorney's lien. Plaintiff failed to discriminate between an act done in a representative and one done in a personal capacity. If she had paid said judgment from her own property, after notice of a lien on the claim, she then might have been subject to the action (*Baker v. Baker*, 258 Ill. 418); but acting as executrix under order of court, she did not become personally liable for the amount of the lien.

But the record does not clearly indicate that plaintiff Heron had an attorney's lien, and if he did not have one, then there was no ground for the action.

But the record does not clearly indicate that plaintiff Heron had an attorney's lien, and if he did not have one, then there was no ground for the action.

One Brown was Tate's attorney in both the law and chancery proceedings above referred to. Afterwards, according to Heron's testimony, Tate came to him and said that "Brown, his attorney, had taken the matter from the Superior Court to the Appellate Court to have a bill of review reviewed, if something of

that sort," * * * and that he wished Heron to loan him \$25 for costs already incurred in printing briefs and abstracts and to assist Brown in every way possible in the Appellate Court, and that if he ever got any money out of that judgment against the Roberts family, he would pay Heron \$100. Heron testified that his services were for assisting Brown "in that matter" (whatever it was), and paying \$25 for the printing, etc., and that shortly afterwards he served a notice of an attorney's lien on defendant. He had nothing whatever to do with the Probate Court proceedings, and it does not appear that the proceeding in which he was engaged to assist Brown had anything to do with the cause of action in which the lien on Corlett's real estate was procured. If his testimony is to be taken literally, then he was engaged in a proceeding taken to the Appellate Court by Brown on "a bill of review." That because of such proceeding and what it had to do with the Tate lien is left entirely to conjecture. If he meant that a writ of error was sued out in either the law or chancery case, questioning either the judgment against Tate or the decree against Corlett's property, his testimony is insufficient to warrant such an inference. But even if one or the other proceeding was taken to the Appellate Court, and the judgment or decree affirmed and Heron had a lien thereon, still no right of action accrued against defendant for the payment made by her as executrix under an order of court. The judgment will be reversed.

REVERSED.

FINDING OF FACT.

We find as the ultimate fact that the payment of the \$1000 referred to in the statement of claim was made by Winnie C. Roberts, plaintiff in error, in her representative capacity as executrix of the last will and testament of James Corlett, deceased, pursuant to an order of the Probate Court, and not in her personal capacity or from the proceeds of her personal property; and we further find that John Heron, defendant in error, did not have an attorney's lien on the fund from which such payment was made.

311 - 1000

JOHN C. FHELAN, Defendant in Error,	}	Error to Municipal Court of Chicago.
vs.		
DEKALE WAGON COMPANY, a corpo- ration, Plaintiff in Error.		

192 I.A. 519

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Fhelean brought a replevin suit for two automobile trucks. The findings of the court were in his favor. The only question raised in the record is whether the findings were against the manifest weight of the evidence, which was very conflicting and depended, in our opinion, more upon the credibility of the witnesses than the character of the evidence submitted. No argument is made in this court except by plaintiff in error, which, together with the abstract, we have carefully examined, and, while we recognize that the evidence is irreconcilable, we are unable to say that its weight is manifestly against the court's findings. It would subserve no useful purpose to analyze evidence conflicting at every material point, and compelling a conclusion mainly upon the credibility of the witnesses or the accuracy of their recollections. It is of such a character that, whichever way the court or jury might have found the facts, we would not be justified in disturbing the judgment. The documentary evidence offered may be reconciled with the theory of either side. Possibly we might have reached a different conclusion as a trial court, but we cannot say that the evidence manifestly preponderates against the conclusion reached by the trial judge to whom the case was submitted and who had a better opportunity for determining the credibility of the witnesses than we have. The judgment is affirmed.

AFFIRMED.

ROY D. KEENE,

Appellee,

vs.

SAMUEL E. MOIST,

Appellant.

Appeal from
Municipal Court
of Chicago.

1211A 520

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on a verdict for \$1200 in favor of appellee Keene brought by him to recover the reasonable value of legal services rendered appellant Moist in three law suits, in one of which he was indicted. For a defense it was contended (1) that plaintiff had been paid more than a fair, reasonable and just value for the services rendered defendant, and (2) that there was an agreement between the parties that plaintiff was not to charge more than \$2000 for his services in the criminal case, which required the greater part of his services.

We do not deem it necessary to review the evidence that relates to the first contention, but that relating to the second raised a sharp issue between the parties as to whether or not there was a binding offer and acceptance constituting a valid and binding contract whereby plaintiff was to be paid a sum not to exceed \$2000 for his services in the criminal case. If there was such a contract, then plaintiff was not entitled to recover for services in that case on the theory of quantum meruit, and we think the preponderance of evidence was with defendant upon that issue.

The indictment was found by a Federal grand jury May 17, 1912, charging Moist with a scheme to use the United States mails in connection with an alleged fraudulent device to advertise pianos which he was engaged in selling. The same device was also used by other piano concerns. After Moist was indicted, he had a conversation with plaintiff as to his fees in the matter. Keene refers to a discussion on the subject in his letter of May 20th,

hereinafter set out in full. Moist's version of that conversation corresponds with the two indicated letters of that date. He says that Keehn said other piano men were interested, and ought to contribute to the expenses of the case, and that he would write a letter which Moist was to show them to induce such contribution. That letter (which is too long to be incorporated in this opinion) was to the effect that other piano men were as much interested in the outcome of the case as Moist, and ought to bear the expense of it, which would be more than he could properly stand personally, if tried as it ought to be; that if he pleaded guilty the prosecution would not end with him, but the Government would then "go after all of them"; that Keehn had an understanding with the district attorney that it was to be a test case, and that it was "a case in which, if properly tried, including attorney's fees, a bill of \$5000 should be rendered."

Enclosed in the same envelope was another manifestly private letter to Moist of the same date, referring to the conversation, as follows:

"Dear Mr. Moist:

I am enclosing herewith letter which I think will answer the purpose that we discussed this morning.

Kindly let me know by Wednesday what can be done as I will have to prepare the deurrer and get to work on the brief. In the event that you find you are alone in the matter, I could outline the expense to be about as follows:

Cut the bill to \$5,000, you to pay the printing and court reporters' bills. In fact, we might do a little better than this but I would want to find out first just what we will have to meet.

Yours very truly,
Roy D. Keehn."

Three days later, Moist paid Keehn \$500 upon the understanding, he claims, that Keehn would "cut the \$5000," if all the work outlined in the letter to be shown became unnecessary, and was to receive no more till the case was "finished." Afterwards Moist paid plaintiff \$1200 more, and he testified that when the last \$500 was paid, he reminded Keehn that it was not according to contract to pay the entire \$2000 until the matter was ended. While Keehn denies some parts of these conversations, we think the evi-

dence strongly tends to show that Moist acted on the proposition in said private letter. Keelin's counsel undertook to meet the effect thereof with testimony tending to show that another plane company had contributed to Moist's expenses account in the litigation. But such testimony did not support a claim for a reasonable fee, but simply brought in question which of the two propositions was accepted. // If there was a contract plaintiff could not recover on a quantum meruit, and if other plane men, as suggested in the letter intended for their removal, entered into an agreement with Moist to share the expenses of the suit, then the question might arise which of plaintiff's propositions was accepted. But the pleadings were not framed to present that issue. It is difficult to reconcile the entire evidence upon any other theory than that Moist accepted one proposition or the other. On such a view of the record, plaintiff could not recover on a quantum meruit for services in the criminal case even if he might for services in the other cases; hence, there must be a new trial.

REVERSED AND REMANDED.

WALTER H. KIRK,
Plaintiff in Error,

vs.

H. WEINSHAUSEN, trading as GERMAN-
AMERICAN OIL COMPANY,
Defendant in Error.

Error to
Municipal Court
of Chicago.

1921 A. 322

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question presented upon the record before us is whether the finding and judgment of the trial court are manifestly against the weight of the evidence.

The plaintiff, Kirk, brought suit to recover a balance of \$180.60, as commissions claimed to be due him as a broker in negotiating a sale of twelve carloads of iron drums. We have carefully reviewed the testimony, which covers about seventy pages of the abstract and is so conflicting on the material points that this court may well leave the questions of fact as determined in the lower court.

Kirk claims to have negotiated as a broker the sale of said drums, some to the Emery Candle Company of Cincinnati, and some to the Holbrook Manufacturing Company of Jersey City. Owing to disputes or misunderstandings over the terms of the contracts, which need not here be considered, the former company accepted only a part of the goods, and the latter company refused to receive any. There was also a dispute between the parties to the suit as to the terms of the arrangements between them, Weinschausen claiming and Kirk denying that the former's acceptance of the latter's contracts of sale was conditional on confirmation of them in Germany and his ability to obtain and deliver the goods, and also that commissions were to be paid only after the goods were paid for.

There was another vital question as to which there was a direct conflict, namely, whether the words "payment in full" and

"payment in full up to date," were written on a check for commissions, given by defendant to plaintiff's order, before the latter received and endorsed it. Defendant swore positively that they were so written, and testimony by an expert in handwriting tended to corroborate him. On the other hand plaintiff and his associate in business gave testimony tending to show the contrary. If the check was received by plaintiff with those words on it or from the evidence the court so believed, then we think the record sufficiently shows a then existing difference between the parties over the extent of defendant's liability for commissions to warrant treating the acceptance of the check as an accord and satisfaction. The question arises only as one of fact, as no question of law is raised on this subject.

Even though this court might differ with the trial court as to the weight of the evidence, still it is well understood that the purpose of bringing a case to this court on the question of weight of evidence is not for an opinion as to where the weight lies unless we can say that the finding of the court or verdict of the jury is manifestly against the weight of the evidence; and it is only when we can say that it is, that we are justified in reversing a case upon the facts. We are unable to say so in this case. The judgment is affirmed.

AFFIRMED.

THE CITY OF CHICAGO, Defendant in Error, vs. TRUAX GREENE & CO., a corporation, Plaintiff in Error.	} } } }	Error to Municipal Court of Chicago.
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1921 A. 528

MR. PRESIDING JUSTICE PARKER DELIVERED THE OPINION OF THE COURT.

Judgment was recovered against plaintiff in error for violation of an ordinance of the city of Chicago prohibiting the sale of cocaine by ^adruggist or other person "except upon the written prescription of a duly registered physician," and except that the drug may lawfully be sold at wholesale "upon the written order of a licensed pharmacist or licensed druggist, duly registered practicing physician, licensed veterinarian, or licensed dentist."

There was no pretense that the purchaser of the cocaine, one O'Donnell, came within any of these classifications, or that the purchases were made upon other than fictitious orders, the first purporting to be signed by "J. E. Hoffman, M. D." and the other twelve by "J. E. Hoffman, M. D."

The defense was that the clerk who made the sales was deceived by O'Donnell into the belief that the orders were genuine and made by physicians for whom O'Donnell was a messenger, that he did not know to the contrary, and did not intend to sell to O'Donnell other than in such representative capacity, and, hence, that there was no sale because there was no meeting of minds.

Errors were assigned to the refusal of the court to admit evidence of the clerk's intent or belief and evidence of the directions as to sales given to him by his employer, and to the ruling and remark of the court that counsel for plaintiff in error must not argue to the jury that there was no sale.

None of these points call for a reversal of the case.

The clerk's intent and belief were immaterial, except in mitigation of the fine. The ordinance does not require that a sale must be knowingly and wilfully made in violation thereof. The ordinance prohibits the sale of cocaine and certain other drugs except in conformity with the conditions above prescribed, which the seller and his agent are bound to observe. The prohibition is absolute except upon such conditions, and the seller is bound to know whether the sale comes within the specified restrictions. A sale without such knowledge is made at his peril. (McCutcheon v. Pearls, 82 Ill. 501; People v. Nylin, 306 id. 12, Greenleaf on Evid., Vol. 3, Sec. 51.)

In the instant case the clerk was bound to know whether the written orders relied upon were authentic and made by registered or licensed physicians, and he sold at his own risk in accepting them as such.

The material facts being undisputed that the goods were delivered to and paid for by O'Connell, though on fictitious orders, whether there was a sale was a question of law for the court and not of fact for the jury. The court, however, did submit to the jury whether such transactions constituted a violation of the ordinance, although there was no dispute as to material facts. The contention that there is no meeting of minds to constitute a sale where there is delivery by a salesman to a cash purchaser of goods out of stock kept for sale, even though the seller was deceived as to the genuineness of the order therefor and the real beneficiary, is untenable.

The court properly instructed the jury that with reference to fixing the penalty it might consider the absence of a guilty intent or the existence of an honest motive in the mind of the clerk, and as the jury fixed the minimum penalty for the several violations proven and the material transactions were not disputed, the plaintiff in error could not have been injured by the rulings or remarks of the court, if erroneous. A judgment against plaintiff in error of the court is erroneous. A judgment against plaintiff

in error was bound to follow on the undisputed facts, and could not have been for a legal reason, and must be affirmed.

7/11/1917.

ELMER F. CHALLENGER,
Defendant in Error.

vs.

MERCHANT and MINEER BANK,
Plaintiff in Error.

First National Bank, Garnishee.

1914-15

Municipal Court
of Chicago.

192 I.A. 530

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

The plaintiff, Elmer F. Challenger, commenced an attachment suit in the Municipal Court of Chicago against the defendant, Merchant and Mineer Bank, a Michigan corporation with principal office at Calumet, Michigan (hereinafter called M. & M. Bank), to recover the sum of \$215, principal and interest alleged to be due upon a certain check which defendant had certified. The First National Bank of Chicago was summoned as garnishee, and the defendant entered a general appearance. The case was tried before the court without a jury and on May 28, 1914, the court found the issue as to the attachment and as to the writs against defendant, and assessed plaintiff's damages at \$215. Upon this finding the court adjigned that the attachment be sustained, that plaintiff recover of the defendant the sum of \$215, and that defendant have judgment on the answer of the garnishee and recover said sum of the garnishee for the use of the plaintiff. The defendant, M. & M. Bank, sued out this writ of error to reverse the judgment.

✓ In the latter part of September, 1913, one Hailer, representing the Commonwealth Corporation (a Delaware corporation, with office in Detroit, Michigan), went to Calumet, Michigan, for the purpose of selling certain of the capital stock and bonds of that company. Among others he called upon Herman MacDonald, Jr.

William T. King and Harry T. King. McDonalds and Dr. King and the wife of Harry T. King were all stockholders of the Metropolitan State Bank of Detroit, Michigan. Heider falsely represented to said parties that the Commonwealth Corporation was affiliated with said Metropolitan State Bank and was organized by said bank for the purpose of handling a certain class of investments which the bank could not deal in under Michigan laws. As a result of Heider's negotiations with said parties separately, McDonalds agreed to purchase 30 shares of the capital stock of the Commonwealth Corporation and a bond of the company, with the understanding that said securities would be sent to the M. & M. Bank for delivery to McDonalds upon payment of the agreed price; Dr. King purchased 12 shares of stock and a bond of the company, received a certificate for said shares and the bond, and gave a New York draft of the M. & M. Bank for \$1,000 in payment therefor; and Harry T. King purchased 8 shares of stock and a bond of the company, received a certificate for 8 shares and the bond, and delivered to Heider his (King's) personal check for \$500, dated October 1, 1913, drawn on the M. & M. Bank, and payable to the order of the Commonwealth Corporation. Heider at once presented said check for certification and the same was certified by the M. & M. Bank on October 1, 1913, and returned to Heider. This is the check now in in the present action. The Commonwealth Corporation transferred it by endorsement to the Hanover Bank of Lacey & Company, of Hanover, Michigan, and that bank endorsed and sent it to the La Salle Street Trust & Savings Bank of Chicago, which bank endorsed it and forwarded it to the defendant, M. & M. Bank, for collection and remittance; but said defendant, for reasons hereinafter mentioned, refused to pay the check, caused it to be protested and returned it to said La Salle Street Bank of Chicago, which bank returned it to said Hanover Bank. Subsequently the Hanover Bank endorsed and delivered the check to the plain-

liff, Elmer S. Challenger. Plaintiff testifies that Leo Hanover Bank was indebted to him for certain legal services rendered; that upon his making demand of payment for said services a representative of that bank suggested his taking said check in payment of his services; that after investigation he accepted the check in payment of said services, and that he never had any dealings or relations with the Commonwealth Corporation.

On October 2, 1913, the day after Harry T. King had delivered said check to Heiler, King learned that Heiler's representations that the Metropolitan State Bank was affiliated with the Commonwealth Corporation were false. King had been induced on the strength of those representations to purchase said 3 shares of stock and the bond. He immediately communicated with "F. Anderson, vice-president and general manager of the M. & K. Bank, and requested him to stop payment of said check and "to try and recover the same." About the same time MacDonald and Dr. King received the same information and they also communicated with Anderson. On October 3, 1913, Anderson, as such vice-president and general manager, wrote the following letter to the Commonwealth Corporation, which that company received but to which it made no reply:

"You will find enclosed certificate \$118 for 30 shares of the capital stock of the Commonwealth Corporation in the name of Norman MacDonald, and bond \$ 512 for \$3,000.00, received by mail from your Mr. Heiler, for the account of Mr. Norman MacDonald. Mr. MacDonald has requested us to say to you that he does not wish to take said securities.

"Your Mr. Heiler sold to Mr. William T. King of Alhambra \$1,500.00 of securities issued by your corporation, and he also sold to Mr. Harry T. King, of Laurium, \$200.00 of said securities. These three gentlemen have reported us to say to you that said securities were sold to them under false representations, and we were requested to stop payment of our New York draft for \$1,500.00 issued in payment of securities sold to Mr. William T. King, and payment has also been stopped on certified check issued in payment of securities sold to Mr. Harry T. King.

"If you will return to this bank the New York draft and
certified check aforementioned, we shall send to you the securi-
ties sold to Dr. William T. King and Mr. Harry T. King."

In the view we take of this case we think that the correctness of the finding and judgment against the defendant depends

upon the question whether said letter of October 3, 1913, operated as a rescission on the ground of fraud, of Harry E. King's purchase of said 8 shares of stock and the bond. We do not think that it did so operate. It is well settled that a party who has been induced by fraud to purchase property may rescind the purchase and recover the consideration paid, provided he acts promptly and unequivocally. But it is not sufficient for him to merely signify an intention to rescind. He must either return the property purchased or tender the same to the vendor. (Engelhard v. Harney, 13 Ill. 336; Peoria, etc., Ins. Co. v. Bette, 37 Ill. 316, 319; Brady v. Cole, 185 Ill. 116, 121; Mitchell v. Mitchell, 253 Ill. 165, 170; Storger & Burn Co. v. Great Western C. & E. Co., 153 Ill. App. 471, 470.) The offer contained in said letter was to the effect that if the Commonwealth Corporation would return to the defendant (acting as agent for Dr. King as well as Harry E. King) both the \$1,500 New York draft and the certified check in question, the defendant would forward to said Corporation the securities sold to Dr. King and Harry E. King. Manifestly, this was not an offer on the part of Harry E. King alone that, if said certified check was returned, said Corporation would receive back said 8 shares of stock and the bond sold him. By the terms of the offer it was assumed of the Corporation that it also first return said New York draft. Furthermore, the tender was not an unqualified one, but one conditional upon the Corporation first doing something. (See Peoria, etc., Ins. Co. v. Bette, supra.) In our opinion the finding and judgment were warranted by the evidence and the law, and the judgment will be affirmed.

AFFIRMED.

TONY NOCIL, by his next friend,
Joseph Noeil,

Defendant in Error,

vs.

ELLIS TIME STAMP COMPANY, a
corporation,

Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1021A.588

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

✓ Tony Noeil, a minor, 16 years of age, entered the employ of the Ellis Time Stamp Company, a corporation, on June 17, 1912. He was put to work by the foreman at a punch press in the company's factory at No. 326 Franklin street, Chicago. On Wednesday morning, June 19, 1912, while he was working at the press, two of his fingers were caught in the press and were cut off at a point about 1/16th of an inch back of the nail. On December 16, 1912, by his next friend, he commenced an action of the 4th class in the Municipal Court of Chicago against said company to recover damages for the injury sustained. The cause was tried before a jury resulting in a verdict and judgment against the defendant company for \$2050. It is sought by this writ of error to reverse the judgment.

In plaintiff's amended statement of claim, filed April 28, 1913, it was charged that defendant was negligent (a) in failing to provide suitable guards on said punch machine, contrary to the statute, (b) in using said punch press when the same was known to be dangerously defective, contrary to the statute, and (c) in failing to provide suitable and proper means for disconnecting the power from said press while same was used by employees, contrary to the statute.

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To this amended statement of claim the defendant filed an affidavit of merits in which it set up as a defense the provisions of the act commonly known as the "Workmen's Compensation Act of 1911," approved June 10, 1911, and in force May 1, 1912. It was alleged that the defendant had elected to provide and pay compensation for injuries sustained by any employee, arising out of and in the course of employment, according to the provisions of said act, and that thereby the defendant had relieved itself from any liability for the recovery of damages by plaintiff except as in said act provided; that plaintiff has not filed a notice disaffirming said act with the Secretary of the State Bureau of Labor Statistics, and should thereby be deemed to have accepted the provisions of said act and to be bound thereby; and that plaintiff has made no effort to have his compensation under said act fixed and determined.

In subdivision c of section 1 of said act (Hurd's Stat. 1912, chap. 48, sec. 126) there is contained the following provision: "Provided, however, that before any such employe shall be bound by the provisions of this act, his employer shall either furnish to such employe personally at the time of his hiring, or post in a conspicuous place at the plant or in the room or place where such employe is to be employed, a legible statement of the compensation provisions of this act."

After the above mentioned affidavit of merits had been filed by the defendant, plaintiff asked leave of court to file thereto an "affidavit and replication." Leave was granted and the same was filed on June 3, 1913. Plaintiff therein alleged, inter alia, that he should not be barred from maintaining his aforesaid action against defendant by reason of anything contained in its affidavit of merits because plaintiff says that defendant, as employer of plaintiff, did not furnish to plaintiff personally at the time of hiring, or post in a conspicuous place at

the plant or in the room or place where plaintiff was employed, a legible statement of the compensation provisions of said Workmen's Compensation Act of 1911.

Defendant did not in any manner join issue on the allegations contained in said replication, but, on June 5, 1912, just as the cause was called for trial and before the jury was empanelled, defendant asked and obtained leave to file, and did file, a new affidavit of merits, in which defendant made no mention of said Workmen's Compensation Act. It was therein alleged (1) that defendant did not fail to provide suitable guards on said punch machine, but that on the contrary the machine was properly equipped; (2) that said press was not dangerously or at all defective; (3) that it was provided with proper means for disconnecting the power therefrom; (4) that plaintiff's injuries were due solely to his own negligence and not to any negligence of defendant; (5) and that plaintiff, before entering upon his work on said press represented to defendant that he was familiar with the operation of such presses, and that defendant, relying upon said representations, permitted him to operate said press.

Immediately after defendant had filed said new affidavit of merits, plaintiff asked and obtained leave to file, and did file, an "additional" statement of claim, and it was ordered that defendant's said affidavit of merits stand as answer thereto. In this additional statement of claim plaintiff also claimed damages because of the negligence of defendant (1) in failing to provide plaintiff with a safe place to work, (2) in furnishing to plaintiff a dangerous punch press in that the same would repeat and come down without warning, and (3) in placing plaintiff, a young and inexperienced person, 18 years of age, to work upon a dangerous press without instructing and warning him with the usual and customary directions for the proper running of said press, whereby he, while using ordinary care for his own safety, was seriously

and permanently injured, etc. ✓

Counsel for defendant here contend that the trial court should have directed a verdict in favor of defendant upon the ground that it does not appear from the evidence that either party elected not to be bound by the provisions of said Workmen's Compensation Act of 1911, and that, therefore, plaintiff was required to proceed under said act. In our opinion, there is no merit in the contention. The defendant in its original affidavit of merits set up the provisions of said act as a defense to plaintiff's action. Plaintiff in reply alleged certain facts which, if true, showed that he should not be bound by the provisions of the act. Defendant did not in any way deny the existence of those facts as alleged, but filed a new affidavit of merits, in which new and different defenses were set forth, and in which no mention was made of said act as a defense. In other words the defendant saw fit to abandon his first defense. And it appears from the stenographic report of the proceedings that the case was tried as though with the understanding between court and counsel that the provisions of said Workmen's Compensation Act were out of the case, and that defendant's only defenses were those contained in said new affidavit of merits. The defendant made no attempt on the trial to show that at the time of plaintiff's hiring he was personally furnished with, or that there was anywhere posted in the defendant's plant, a legible statement of the compensation provisions of said act.

Counsel further contend that the verdict and judgment are not warranted by the evidence or the law. The court submitted the case to the jury on the question whether the defendant had negligently put plaintiff, a minor and inexperienced, at work upon the press without sufficiently instructing him, and without warning him of the dangers in operating the press, and the jury by their verdict found that the defendant was negligent in these par-

ticulars. We think it unnecessary to discuss the evidence contained in the record, which we have carefully reviewed, and deem it sufficient to say that in our opinion the verdict and judgment are fully warranted by the evidence and the law. (Glaich v. Hoxan Envelope Co., 100 Ill. App. 501; Hindley v. Horscomer, 131 Ill. 359, 364; Armstrong v. Ferg, 165 Mass. 644; Hagerty v. St. Paul Brick Co., 93 Minn. 505.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

TONY IANNI,
Plaintiff in Error,
vs.
THOMAS SARGO and
GEORGE FREEMAN,
Defendants in Error.

Error to
Municipal Court
of Chicago.

132 I.A. 541

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

On June 20, 1914, Tony Ianni, plaintiff, commenced an action in replevin in the Municipal Court of Chicago to recover the possession of certain fixtures and furniture of which he claimed to be the owner and lawfully entitled to possession. The bailiff took the property under the writ and delivered it to plaintiff. The defendants in their affidavit of denial denied that they unlawfully took or unlawfully retained the property, and alleged that the same was their property, that plaintiff was not the owner or entitled to the possession of the same, and that defendants had sustained damages in the sum of \$2000 by reason of the wrongful suing out of the writ. The case was tried before the court without a jury. The court found that the right to the possession of the property replevied was not in the plaintiff and assessed defendants' damages at the sum of one cent, overruled plaintiff's motions for a new trial and in arrest of judgment, and on August 3, 1914, entered judgment upon the finding, adjudging that defendants recover from plaintiff the possession of the property, that a writ of repleve habende issue, and that defendants recover from plaintiff said damages of one cent together with costs. Plaintiff seeks by this writ of error to reverse the judgment.

✓ From the stenographic report of the proceedings on the

trial, certified by the trial judge, the following facts in substance appear: The fixtures and furniture replated were contained in a certain shoe-shining parlor in Chicago. Prior to April 26, 1913, one Ezaric Diapenza rented the premises and purchased the fixtures and furniture. One Jack Greco worked for him. On April 26, 1913, Diapenza sold the shoe-shining business and said fixtures and furniture to Greco for the sum of \$750. This transfer was evidenced by a bill of sale, which was recorded on May 2, 1913, in the recorder's office of Cook County, Illinois. Subsequently Greco sold the business and the fixtures and furniture to plaintiff for the sum of \$810. This transfer was also evidenced by a bill of sale, recorded on May 22, 1913. Plaintiff conducted the business on the same premises until some time in the month of June, 1913, when he went to Italy on account of the illness of his mother residing there, and left his business and the furniture and fixtures in charge of Diapenza. Plaintiff testified that when he left Chicago to go to Italy "Greco was working in the place and Diapenza was running it." Some time after plaintiff left Chicago, the defendants, as first parties, and Diapenza and Greco, as second parties, signed a written agreement, dated June 10, 1913, whereby said second parties agreed to sell for \$375, and the defendants agreed to purchase, said shoe-shining parlor and business, and the fixtures, furniture, etc., contained in said parlor. The agreement provided that defendants should pay said second parties \$200, cash, and the balance in monthly payments, \$30 per month for three months and \$25 for the fourth month, and further provided that said second parties (Diapenza and Greco) would guarantee that, "if any one claims title under a bill of sale or otherwise," they would repay to defendants the purchase price. On October 31, 1913, Diapenza and Greco signed and acknowledged a bill of sale conveying said business, fixtures, furniture, etc., to defendants, and defendants thereafter conducted the business

on the same premises. When plaintiff returned to Chicago from Italy in April, 1914, he found the defendant, George Preparas, in charge of the shoe-shining parlor and asked him what he was doing there, and Preparas replied that he and Caros had purchased the place from Diemenna, and requested plaintiff to see Caros. Plaintiff did so and Caros suggested that plaintiff and Caros visit defendants' attorney, Morgan. Plaintiff testified that when they called on Morgan and the situation was explained to him, Morgan said to Caros: "I told you I was right come back and make trouble. * * Now, you have got trouble. * * I told you not to buy the place." Tony Minanti, a notary public and a witness for plaintiff, testified that he drafted the bill of sale from Grano to plaintiff; that he had plaintiff pay Grano \$400; that after plaintiff had left Chicago he was asked to draw the bill of sale from Diemenna and Grano to defendants but that he refused; that he heard Morgan, Caros' attorney, advise Caros not to buy the place because someone else had an interest in it; that he told Diemenna that he must not to sell the property because Ianni might return and then Diemenna might have to give the money back. Plaintiff further testified that he subsequently went to demand of defendants to turn over to him said furniture and fixtures, and that upon defendants' refusal he commenced the present replevin action. ✓

We are of the opinion that the trial court erred in entering the judgment. The evidence shows that plaintiff was the owner of the fixtures and furniture at the time of the attempted sale of the same by Diemenna and Grano to defendants, and that at that time defendants had notice that either plaintiff, or someone besides Diemenna and Grano, claimed title to the same, and that plaintiff was the owner of the same when the replevin suit was commenced. When plaintiff went to Italy and left the fixtures and furniture in the possession and charge of Diemenna, the latter was a mere bailee of the property having no right to sell the same,

and the sale made by Bissenden and Toms to respondents did not impair the title of plaintiff to the property. "An unauthorized sale by a mere naked bailee is a wrongful conversion of the property, and the sale is void as to the owner." (Taylor v. Walsh, 138 Ill. App. 187, 183, and cases there cited.) In Independent Brewing Association v. Cooke Brewing Co., 189 Ill. App. 347, 351, it is said: "A mere naked possession in a vendor will not hold against the true owner, and the latter may purchase his property and recover it from a purchaser without notice, when he has done nothing to estop him from asserting his title. The purchaser must look to his vendor or the implied warranty of title. Klein v. Seabold, 88 Ill. 448; Fessett v. Cahorn, 88 Ill. 411." Under the facts of the present case we think that the trial court should have found that at the time the replevin suit was commenced the title to the property replevied was in plaintiff and that the right to the possession thereof was in plaintiff, and should have entered judgment accordingly.

For the reasons indicated the judgment of the Municipal Court is reversed.

REVERSED.

FINDING OF FACTS. We find that at the time of the commencement of this suit the plaintiff, Tony Inghel, was the owner of the property replevied and entitled to the possession thereof.

SAI J. BRANDENSTEIN, HENRIE
BRANDENSTEIN and EDWARD FRAN-
KELSTEIN, co-partners, of E.
J. BRANDENSTEIN & CO.,

Appeal from
Municipal Court
of Chicago.

GEO. RASMUSSEN COMPANY, a
corporation,

1821.A.545

STATEMENT OF THE CASE. On September 18, 1913, the plain-
tiffs, dealers in coffee in New York City, commenced an action of
the first class in assumpsit in the Municipal Court of Chicago
against Geo. Rasmussen Company, a corporation, defendant, engaged
in the wholesale grocery business in the city of Chicago. One
Alfred Aschendorfer was the manager of plaintiffs' business, and
George Rasmussen and W. Matthiesen were respectively the president
and treasurer of the defendant. The action was brought on two
written instruments or bills, one of which is as follows:

Chicago, 1/13/1913.

Geo. Rasmussen Company hereby agrees to pay to S. J. Bran-
denstein & Co., one thousand dollars on the 12th day of June,
1913, in full settlement of a certain bill of coffee damaged
in the flood, while in transit from New York.

(Signed) Geo. Rasmussen Company,
Geo. Rasmussen, Pres.
W. Matthiesen, Treas.

The other instrument was like the above except that the
date of maturity was August 12, 1913. Plaintiffs claimed that the
sum of \$2,017.00 was due them. The defendant's defense was, as
stated in its affidavit of merits, in substance, that plaintiffs
represented to defendant that plaintiffs had delivered to defendant,
at New York City, one carload of coffee, to-wit, 241 bags of cof-
fee, that said coffee was the property of defendant after said de-
livery at New York City, that said coffee had been damaged or des-
troyed while in transit from New York City to Chicago, and that

defendant had become liable and was indebted to plaintiffs for said coffee; that defendant, relying upon the representations of plaintiffs that they had delivered to defendant at New York City, accepted the two instruments issued upon in part payment of the coffee; that afterwards defendant learned and stated the fact to be that said representations were false and untrue; that plaintiffs did not deliver said coffee, or any part thereof, to defendant at New York City, or elsewhere; that defendant was not indebted in any way to plaintiffs at the time of executing said instruments either for said coffee or for any other matter or thing; that said instruments were made without any good or valuable consideration, that the consideration therefor has wholly failed, and that said instruments were obtained by false representations.

The case was tried before the court without a jury, resulting in a finding and judgment in favor of the defendant. To reverse the judgment plaintiffs appealed to this court.

The facts as disclosed from the evidence are in substance as follows: Between February, 1911, and February, 1913, defendant has purchased various lots of coffee from plaintiffs. The first two shipments were made early in the year 1911, upon the understanding that defendant was to have the money in New York to pay for the coffee before the shipments were made to defendant. In March, 1911, George Rasmussen, while in New York, told Auslander that it was too expensive for defendant to have its money in New York before the coffee left New York, and it was thereupon agreed that future shipments to defendant should be made upon "draft against documents," and that defendant would pay the drafts upon presentation in Chicago. Several lots of coffee were afterwards shipped to defendant and paid for in this manner. Some time during February, 1913, Rasmussen called on Auslander in New York and as a result of the interview defendant contracted to purchase the coffee in question, which at that time was in transit and not yet

received by plaintiffs. It was agreed that defendant should pay plaintiffs what the coffee had cost plaintiffs, plus a commission or profit to plaintiffs of 10 cents per bag, and also all charges for insurance, steve, and for the handling of the coffee until it was put on the train, and that the shipment of the coffee to defendant at this total price should be "f.o.b. New York." In November the coffee arrived in New York, and on March 18, 1918, plaintiffs received from the S. S. Steamer Shipping Company at New York a so-called "order bill of lading," in which the Steamer Company acknowledged the receipt in apparent good order of 240 bags of coffee, "consigned to order of E. J. Brandenstein & Co., Postoffice, Chicago, State of Ill., Notify Geo. Thompson Co. * * at Chicago. * * Route Norfolk & Western, c/o Atlantic R. R." On the face of said bill of lading it was stated that "the presentation of this original order bill of lading properly signed shall be required before the delivery of the property."

Plaintiffs engaged in bank the bill of lading "E. J. Brandenstein & Co.," and, on March 18, 1918, drew a sight draft for \$5,046.17 on defendant payable to the order of the First Bank of Chicago, and enclosed the bill of lading and draft in a letter addressed to said bank, in which letter plaintiffs wrote: "We enclose herewith bill of lading for 240 bags coffee consigned to our own order at Chicago, with instructions to notify George Thompson Co. * * To pay to enclose herewith our draft for \$5046.17, with exchange and collection charges on New York, or Memo. George Thompson Co. Please deliver bill of lading only on payment of this draft, and remit proceeds to us." The word "only" in said letter was underlined in red ink. About the same time plaintiffs mailed to defendant at Chicago a statement or invoice showing the total purchase price of the coffee, including various incidental charges and plaintiffs' profit therein itemized, to be \$5,046.17, and stating that the amount was "payable net cash sight draft

against shipping documents through State Bank of Chicago. In New York Times." Then the State Bank (with which bank defendant then did its banking business) received the draft, bill of lading and letter from plaintiffs, defendant was so advised by telephone by the bank, and defendant requested the bank to hold the draft and bill of lading until the arrival of the coffee in Chicago. This the bank agreed to do. It does not appear that the draft and bill of lading were formally presented to defendant or that any officer or representative of defendant saw the bill of lading. The coffee never arrives at Chicago. While in transit in the state of Ohio it was greatly damaged, if not practically destroyed, by reason of the Ohio flood of 1913.

On April 1, 1913, defendant wrote plaintiffs to the effect that the coffee has not yet arrived in Chicago, that defendant had had the Tannah Railroad "write from this end," that the coffee when last heard from was in Ohio, "delayed evidently on account of flood," and suggesting that plaintiffs "start tracer" from their end, to which plaintiffs replied, on April 4th, that they would start such tracer, and that Aschendorfer would arrive in Chicago on April 10th or 11th. On April 11th defendant received a telegram from plaintiffs, dated April 10th, that plaintiffs had just been advised that the car containing the coffee had been caught in the flood and was at Toledo, Ohio, and had been refused by the Tannah Railroad because "contents hot and steaming causing stench." The telegram further stated: "As the coffee is yours we have taken no action. If we can be of any assistance to you by sending a man to Toledo to sell the coffee for your account at your expense, telegraph us at once and we will be only too pleased to accommodate you." On April 11th defendant sent a representative, one Hasemann, to Toledo to investigate, and he arrived there on April 12th. On the morning of April 11th Aschendorfer arrived in Chicago and met Hasemann by appointment. Aschendorfer told

Remuosen that the coffee belonged to defendant, who had waited the draft paid, and that if it was not paid plaintiffs would sue defendant. Remuosen recalled that he would do nothing until he had received word as to the coffee from Kaufmann, and until he had ascertained whether or not the coffee was defendant's coffee, and arrangements were made for another meeting on the following day. On the morning of April 12th Kaufmann at last communicated with defendant over the long distance telephone, informing defendant that he had seen the coffee, that it was "practically worthless," and that "not more than \$100 could be realized upon it."

About 1 p.m. on April 12th Adelsdorfer met Remuosen and Matthieser at luncheon at the La Salle Hotel in Chicago, and further negotiations were had. Adelsdorfer testified in substance that at this interview he again stated that if defendant did not pay for the coffee immediately plaintiffs would bring suit to recover the purchase price; that he further stated that the coffee was shipped f.o.b. New York and that it was defendant's coffee; that he showed a letter which he had just received from plaintiffs' New York attorney in which the said attorney expressed the opinion that the title to the coffee had passed in New York and that defendant was liable for the full amount; and that Remuosen stated during the interview that he had consulted a Chicago attorney who had advised him to settle without taking the matter into court. Remuosen denied making any such statement or that he had consulted an attorney. Remuosen further testified in substance that at this interview he again expressed doubt as to whether the coffee was defendant's coffee; that thereafter Adelsdorfer said: "Of course it is your coffee; you bought the coffee f.o.b. New York, and there is no question but it is your coffee; I have seen my lawyer in New York about it"; that Adelsdorfer further said: "I feel sorry for you people; if I start suit it going to cost me some money; if I can settle this thing peacefully I am willing to allow you whatever

it might cost for lawyer's fees and so on"; that finally Adelsdorfer suggested an allowance of \$500; that then he (Ermannsen) said: "If you will allow me \$1,000, I will think it over and we can probably make a settlement on that basis"; that Adelsdorfer thereupon said that he would have to wire his office in New York and that as soon as he received a reply he would advise defendant; and that later, about 3 o'clock in the afternoon, Adelsdorfer called at defendant's place of business and further negotiations were had which resulted in the drawing of the notes upon and other papers. Matthiesen, treasurer of defendant, who was present at said interview in the La Salle Hotel testified that Adelsdorfer then "told us that the coffee belonged to us and we had to settle, that he was going to sue for the amount of the coffee, that it was bought f.o.b. New York, and that in consequence we had to pay for it"; that he (Matthiesen) believed Adelsdorfer's statements that the coffee had been shipped f.o.b. New York and the coffee belonged to defendant, "otherwise we would not have signed the notes." Ermannsen also testified that he believed Adelsdorfer's said statements and that these statements were "the basis on which I made the settlement." Both Ermannsen and Matthiesen testified that prior to signing the notes they had not seen the bill of lading, which was still with the State Bank. Adelsdorfer also testified that at the interview with Ermannsen or Matthiesen nothing was stated as to the bill of lading except that after the papers were signed he promised to arrange to have the same turned over to defendant by the bank, and that he (Adelsdorfer) did not at any time inform any person connected with defendant who was the consignee named in the bill of lading.

At the meeting of the parties at defendant's place of business on the afternoon of April 10, 1913, the two notes upon which were executed and delivered to Adelsdorfer, and the other like notes, maturing at dates subsequent to the commencement of

the present action, were also executed and delivered. Additionally, in the name of plaintiff, signed and delivered to defendant a receipt to the effect that plaintiff had received from defendant four notes, amounting to \$4,340.17, "as full settlement for a certain carload of coffee damaged in the flood while in transit from New York. Whatever compensation Geo. Rasmussen Co. receives by sale or salvage, or by settlement with railroad company, H. J. Brammerstein & Co. is entitled to 25 per cent. thereof." On April 17th defendant received the bill of lading from the State Bank, the bank having been instructed by plaintiff's letter, dated April 16th, to turn the same over to defendant; and the bank returned to plaintiff's bank draft of \$4,340.17. Both Rasmussen and Mathiesen testified that they first learned that defendant was not the consignee named in the bill of lading when they received the bill of lading from the bank. Defendant never made any attempt to get the coffee from the railroad company, or to get any money from the railroad company, and never realized anything by way of salvage on the coffee. Rasmussen further testified that after the bill of lading was received from the bank and he had ascertained therefrom that plaintiffs were the consignees named therein, he for the first time consulted an attorney, who expressed it as his opinion that the coffee was not defendant's coffee at any time. The first note matured on June 13, 1913, and, upon the same being presented to defendant for payment, defendant wrote plaintiffs that it would not pay the note, or any of the other notes, for the reasons, as stated in substance, that the defendant had been induced by false and fraudulent representations to sign the notes and that they were without consideration. After the second note matured plaintiffs commenced the present suit. ✓

(Add par 5 a p 11)

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

Defendant's position on the trial was that there was no consideration for the contract agreement or for the two instruments in writing or notes used upon. It is evident from the findings and judgment, and from certain propositions of law submitted by defendant and marked "held" by the court, that the court believed that position to be a correct one.

It is here first contended by counsel for plaintiff's that the court erred in entering the judgment because there was a consideration for said agreement and notes, and that the ownership of the coffee was in defendant at the time of its loss or damage by the Ohio Flood. After careful consideration we are of the opinion that the evidence shows that at least that the title or ownership of the coffee was in the plaintiff's. It appears from the bill of lading that plaintiff's consigned the coffee to the order of themselves. True, plaintiff's endorsed the so-called "warmer bill of lading" in blank, but they did not state or authorize an unconditional delivery of the same to defendant. When plaintiff's forwarded the bill of lading and the draft for \$5,040.17, drawn on defendant, to the State Bank, they gave specific written directions to the bank, viz: "Please deliver bill of lading only on payment of this draft, and remit proceeds to us." From these and other facts in evidence we think it clear that plaintiff's intended to retain the ownership and the jus disponendi of the coffee until the draft was paid. (Spicer v. Sax Valter Co., 134 Ill. App. 311, 335; Kilglin v. Clark, 180 Ill. 105, 347; Lawson v. Waldert Co., 133 Ill. 332, 344; Chaffield-King Co. v. Emerson, 180 Ill. 452, 465; Dowd v. National Exchange Bank, 91 U. S. 618; Erwin v. Harris, 87 Ga. 335; Libby v. Ingalls, 124 Mass. 393.) And the risk of loss or damage to the coffee while in transit from New York to Chicago was upon plaintiff's. (James v. Brewer,

73 Ala. 318, 347; Baker v. Hauricavla, 1 July 28; Hamilton v. Philbrick, 31 Fed. Rep. 600; Craig v. Todd, 181 Iowa 250.)

It is further contended by counsel for plaintiffs that the court erred in entering the judgment, because the notes in question were given in pursuance of a settlement agreement which legally precluded defendant from inquiring into the merits of the original controversy and that said settlement was the consideration for the notes. The argument is that a settlement of a doubtful claim is a sufficient consideration to support a compromise or an accord and satisfaction. In support of their contention counsel cite the cases, among others, of American Trust & Savings Bank v. Lantry Contracting Co., 171 Ill. App. 636, and Honeyman v. Jarvis, 73 Ill. 318. In the Honeyman case it is said (p. 320): "The compromise of a doubtful right, though it afterwards turns out the right is on the other side, where there is neither actual nor constructive fraud, and the parties act in good faith, with full knowledge of the facts, is a sufficient consideration to support a promise." To the above contention counsel for defendant replies that while in a proper case the compromise of a doubtful claim is a sufficient consideration to support a promise, the principle is only applicable where there is some color or some reality to the claim. In McKinley v. Watlins, 13 Ill. 140, 145, it is said: "If the plaintiff was threatening to sue on a claim which he knew was wholly unfounded, and which he was setting up as a mere pretense to extort money from the defendant, a contract founded on a promise not to sue in such a case would be utterly void. In order to support the promise there must be such a claim as to lay a reasonable ground for defendant's making the promise, and then it is immaterial on which side the right may ultimately prove to be." In Mulholland v. Bartlett, 74 Ill. 52, 53, it is said: "The result of the authorities, as we are inclined to think, is, to make forbearance a good consideration, there must be a well

founded claim in law or equity (Torburn), or there must be a compromise of a doubtful right. A compromise implies the yielding of a part of the claim. "It seems to us quite clear here was no compromise of a doubtful claim, but a wrongful assertion of a claim which appellant, when the instrument was executed, had strong reasons for believing had no valid existence as against the appellee." (See, also, Knott v. Knott, 36 Ill. 220; Hamm v. Durham, 23 Ill. 383; Kronmeyer v. Bush, 25 Ill. 505, 506.) In Trust v. Hollis, 23 Ill. 311, 312, it is said: "The surrender of a mere assertion of claim, or the abatement of a threat to sue, when the claim is without legal merit, whether its legal invalidity is known or not, will not uphold a release, or agreement of compromise. When a claim is absolutely and clearly unsustainable at law or in equity, its compromise constitutes no sufficient legal consideration." In H. C. Mortgage Co. v. Henderson, 111 Ill. 34, 35, it is said: "In order that a compromise may constitute a sufficient consideration to support an executory contract, the claim compromised must have been at least 'doubtful,' and there must have been some colorable ground of dispute, and some legal or equitable foundation for the claim." Counsel for defendant further urges, in addition to the contention that at the time the notes were executed the claim of plaintiffs was not even a "doubtful" one, that the evidence shows that defendant's officers did not have full knowledge of the true facts, that Adelsorfer concealed from defendant's officers the fact that plaintiffs were named as the assignees in the bill of lading, that Adelsorfer, knowing that fact, did not act in good faith when he insisted that the coffee was delivered to defendant in New York and that it was defendant's coffee, and that Adelsorfer, as plaintiffs' agent, made false and fraudulent representations to defendant's officers upon which they were induced to sign the notes. There is evidence tending to support counsel's contention

and we cannot say that the finding of the court is manifestly against the weight of the evidence in this regard.

Complaint is made that the court erred in refusing to admit certain evidence offered by plaintiff, and in making "hold" certain proposition of law submitted by defendant. In our opinion no error prejudicial to the plaintiff was committed by the court in these particular.

We think that the finding and judgment are sufficiently supported by the evidence and the law, and, accordingly, the judgment of the Municipal Court is affirmed.

WITNESSETH.

2082
2854 - 2082

TEANDER G. PETERSON,
Appellee,

vs.

O. C. PETERSON et al.,
Appellants.

Appeal from
Superior Court,
Cook County.

192 I.A. 553

STATEMENT OF THE CASE. ✓ This is an appeal from a decree of the Superior Court of Cook County, entered July 16, 1913, in favor of Teander G. Peterson, complainant. The appeal was originally taken to the Supreme Court upon the theory, evidently, that a freehold was involved in the litigation, and at the February term, 1914, the Supreme Court rendered a judgment in the cause affirming the decree. But, upon petition, a rehearing was allowed, and at the June term, 1914, the Supreme Court transferred the cause to this court, holding that it had no jurisdiction of the appeal inasmuch as a freehold was not involved. (Peterson v. Peterson, 284 Ill. 121, 122.)

Complainant's original bill was filed on April 3, 1911. He therein prayed for an accounting, for the specific performance of a verbal contract providing for the conveyance to him of the premises in question, and for an injunction to restrain the further prosecution of a forcible detainer action commenced against him on April 3, 1911. A preliminary injunction was issued. All of defendants, O. C. Peterson, William A. Peterson, Charles J. Ohman and Anna C. Ohman, his wife, filed a joint and several answer, denying the material allegations of the bill, and the cause was referred to a master in chancery to take proofs and report his conclusions of law and findings of fact thereon. On June 11, 1911, by leave of court and without prejudice to the reference, complainant filed an amended bill.

In this amended bill complainant alleged, in substance, that prior to November 26, 1906, the defendant Charles J. Ohman was the owner of certain property on St. Lawrence avenue in Chicago; that said property was subject to a trust deed (hereinafter referred to as the Strauss mortgage) executed by said Ohman and his wife to secure an indebtedness of \$9,800, incurred for the purpose of erecting three two-flat buildings on said property; that complainant had entered into a contract with said Ohman to furnish and had furnished certain labor and materials in the erection of said buildings; that on November 26, 1906, complainant filed a bill in the Circuit Court of Cook County against said Ohman and others, to enforce a mechanic's lien on said property and buildings for said labor and materials so furnished; that in said mechanic's lien cause the defendant, O. C. Peterson, acted as the solicitor for said Ohman and wife; that about June 28, 1908, a decree was entered in said cause establishing complainant's right to a mechanic's lien and ordering a sale of the premises to satisfy the lien; that about July 23, 1908, said premises were sold by a master in chancery to V. G. Gallagher, solicitor for complainant in said cause, for the sum of \$1,850.70; that subsequently said Gallagher assigned and delivered the master's certificate of sale to complainant, who thereafter borrowed \$1,000 from the Chicago City Bank, giving his note therefor and pledging said certificate as collateral security; that at the time complainant filed his said bill for a mechanic's lien he was residing, and has since continuously resided, in one of said flats, and that after said premises were sold to aforesaid complainant collection of certain rents from other persons, except said Ohman, living in said buildings; that after the issuance of said master's certificate of sale said Ohman, the owner of the equity of redemption, assigned and transferred to the defendant, O. C. Peterson, all his

interest in the income from said buildings; and thereafter, after an accounting being had between complainant and said O. C. Peterson, it was found that complainant was indebted to said O. C. Peterson, on account of rents, in the sum of \$550, which said complainant was then unable to pay, and that some time in the early part of the year 1910, by agreement, said O. C. Peterson recovered a judgment against complainant for said sum, which judgment remains unsatisfied; that prior to August 1, 1910, said Olson had paid upon the principal of said Strauss mortgage the sum of \$1,500; that the notes evidencing said indebtedness had been signed by complainant as well as by said Olson; that in the month of August, 1910, the premises were subject to a sale for taxes, and the holder of the tax sale certificate would have become entitled to a deed thereunder in the month of November, 1910; that the notes secured by said Strauss mortgage became due and payable in September, 1910; that in August, 1910, complainant had no property out of which the said O. C. Peterson judgment for \$550 against him could be satisfied, and had no property except said master's certificate of sale, pledged as aforesaid to the Chicago City Bank, all of which was well known to said O. C. Peterson; that during said month of August, 1910, said O. C. Peterson approached complainant for the purpose of obtaining security for the payment of his said judgment, and such negotiations were had that it was agreed between complainant and said O. C. Peterson that complainant would assign said master's certificate of sale to said O. C. Peterson, and that the latter would take up complainant's note of \$1,500 to said Chicago City Bank for which he held said certificate as collateral, would redeem said premises from said tax sale, would pay the interest due on said Strauss mortgage, would arrange for an extension of said mortgage, would secure the issuing of a master's deed upon said certificate if the premises were not de-

deceased, and could hold said certificate and deed as security for the payment by complainant to him, said O. C. Peterson, of the amounts so to be advanced and of the amount of said judgment with interest thereon, and that upon payment by complainant to said O. C. Peterson of said amounts so advanced, together with the amount of said judgment and interest, complainant might redeem said premises; that in pursuance of said agreement complainant assigned his interest in said certificate of sale to said O. C. Peterson, and the latter paid to said Chicago City Bank the amount of complainant's indebtedness to it and received from the bank complainant's said note and he still holds the same as an obligation against complainant; that O. C. Peterson also paid \$200 upon the balance due upon the notes secured by said Straus mortgage and procured a new loan upon the premises in the sum of \$7,500, but lost the principal note evidencing the former loan, signed by complainant as well as by said Olson as aforesaid, and has cancelled and the same remains outstanding as a liability against complainant; that said O. C. Peterson also paid the amount necessary to redeem said premises from said tax sale, and also paid some interest which had accrued upon the balance of \$4,500 due upon said Straus mortgage, and has since also paid certain accrued interest on said indebtedness of \$7,500; that the reasonable rental value of the six flats in said building is \$150 per month; that said flats have all been rented and the rents thereof, save one flat, have been collected either by said O. C. Peterson, or by said Olson or his wife pretending to act under authority from said O. C. Peterson; that complainant has lived in one flat and has paid no rent therefor since the making of said agreement with said O. C. Peterson; that the deed to said premises, issued upon the master's certificate of sale, was issued on or about October 24, 1910, and that said O. C. Peterson procured the same to be issued in the name of the defendant, William A. Peterson, a brother

of said O. C. Peterson, but that said William A. Peterson has no interest in said premises and holds title to the same as a named trustee.

Complainant further charged in his amended bill in substance that said O. C. Peterson, in approaching complainant in August, 1910, and in entering into negotiations with him as aforesaid, acted as the representative of and in conspiracy with said Ohman and wife for the purpose of cheating and defrauding complainant out of said premises, and so that said Ohman might enjoy the beneficial use of the premises, after the expiration of the period of redemption from said master's sale, without paying complainant the amount found due him by the decree in said mechanic's lien cause; that the said Ohmans have collected all of the rents of said premises, except for the flat occupied by complainant, and have retained said rents for their own use with the knowledge and consent of said O. C. Peterson, and as part of said conspiracy; that complainant has frequently requested said O. C. Peterson to come to an account with him as to what amount may be due from complainant for the same so advanced by said O. C. Peterson and for the amount of ^{his} said judgment and interest (complainant to be allowed credit for the rents collected less any proper expenditures), and that said O. C. Peterson convey said premises to complainant upon the payment of said amounts, but that O. C. Peterson has refused and still refuses to account and denies complainant's right to redeem said premises on compliance with said agreement; that in pursuance of said scheme to cheat and defraud complainant, said O. C. Peterson has instituted proceedings in the Municipal Court of Chicago to evict complainant from said flat now occupied by him, and that unless restrained said O. C. Peterson will proceed to enforce his legal rights against complainant in derogation of complainant's equitable rights under said agreement. The bill prayed that an account be taken to ascertain what amount remained

due and owing to said O. C. Peterson from complainant, that upon payment by complainant of such amount said William A. Peterson be decreed to execute a conveyance of said premises to complainant and that possession of said premises be delivered to complainant, and that the defendants be restrained from bringing or prosecuting any suit or suits at law in respect to the possession of said premises, etc.

To this amended bill the defendants filed a joint and several answer denying the material allegations of the bill and denying that complainant was entitled to the relief sought, and by an amendment to the answer they set up the statute of frauds as a defense.

The master made his report in which he found the facts substantially as alleged in complainant's amended bill. The master further found in substance that, subsequent to the sale of the premises under the decree in said mechanic's lien proceedings and after said Ohman had assigned the rents to O. C. Peterson, Ohman continued to collect the rents as he had previously done, but that it did not satisfactorily appear that any accounting was ever had as to said rents between said Ohman and O. C. Peterson; that complainant and said Ohman have resided in flats in said building since the same were erected; that the master's deed on said certificate of sale was due on October 24, 1910, that said Ohman's right to redemption expired on July 24, 1910, and that his said assignment of the rents to O. C. Peterson was made while he still had the right of redemption; that complainant did not pay any rent for the flat occupied by him to said Ohman for some considerable period prior to said assignment of the rentals from Ohman to O. C. Peterson, except such rentals as were included in said O. C. Peterson's judgment of \$550 against complainant; that some time prior to August 10, 1910, O. C. Peterson, acting in behalf of said Ohman, entered into negotiations with complainant,

through said V. O. Gallagher, complainant's attorney, for the purchase of said master's certificate of sale, and offered to pay therefor the sum of \$2,500, which offer was refused; that during said month of August, 1910, while complainant's attorney, Gallagher, was absent from the city, O. C. Peterson visited complainant and entered into negotiations with him which resulted in the making of the verbal agreement mentioned in complainant's bill and the assignment of said master's certificate to O. C. Peterson in accordance with said agreement; that it is difficult to determine from the evidence just what time was fixed by the parties to said verbal agreement within which complainant might redeem; that said O. C. Peterson testified that the date for redemption was fixed at October 24, 1910; that even though the time of redemption was fixed at said date, complainant could not then have redeemed from O. C. Peterson because the latter had not then performed his part of the agreement, in that on said date said Strauss mortgage and other items which O. C. Peterson had agreed to pay had not been paid; that O. C. Peterson, on August 8, 1910, paid \$1,000 to said Chicago City Bank, and received from said Bank complainant's note of \$1,000, and also received said master's certificate as deposited as collateral security to said note, but that said note was not surrendered to complainant and is now a valid indebtedness from complainant to O. C. Peterson; that O. C. Peterson also paid the sum of \$781.20 to redeem the premises from said tax sale; that after the master's deed was issued to said William F. Peterson October 24, 1910, to-wit, on November 28, 1910, O. C. Peterson paid \$200 of the principal on said Strauss mortgage, and \$40 interest, and after making said payments procured a new loan of \$7,500 on said premises from Prescott & Burch, and from the proceeds thereof paid the balance due upon said Strauss mortgage, and the same was released; that subsequent to the master's sale under the decree in said mechanic's lien proceedings complainant's attorney,

V. G. Gallagher, purchased certain interest notes, or coupons, on the Chicago mortgage, and, in order to assist O. C. Peterson in arranging for said new loan from Prescott & Burch, Gallagher, acting for complainant, turned over to said O. C. Peterson said interest notes or coupons; that the fair, cash market value of said premises in the month of August, 1910, was upwards of \$10,000; that the complainant is a mechanical contractor and that he is unfamiliar with negotiations involving questions of law or legal details, while the defendant, O. C. Peterson, is a member of the Chicago bar and familiar with law and legal details; and that in the negotiations between O. C. Peterson and complainant the former was acting in behalf of said O'Connell and that the latter was not advised of that fact and did not know that he was jeopardizing his rights and interest in said premises.

The master also found in his report the amount due complainant from O. C. Peterson for the rental value of five flats from November 1, 1910, to the date of his report, and also found the amount due O. C. Peterson from complainant to the date of said report. The master further found that the equities of the cause were with complainant; that the agreement between O. C. Peterson and complainant, the said assignment to O. C. Peterson of said master's certificate of sale and the issuance of the deed thereon amounted to an equitable mortgage; that William A. Peterson held the legal title to said premises as a naked trustee; that complainant was entitled to redeem the premises from the defendants upon payment of the amount which might be found due at the date of the entry of a decree in this cause, said payment to be made within a reasonable time; and the master recommended that a decree be entered in accordance with the prayer of complainant's amended bill and the master's findings and conclusions.

The defendants filed objections to said report, which were overruled, and the same were allowed to stand as exceptions on the hearing before the court. The court, upon the hearing,

overruled the exceptions and entered a decree in accordance with the master's findings. The decree re-referred the matter to the master to take a further and final account of what was due O. C. Peterson under said agreement between O. C. Peterson and complainant, including any amounts not specified therein which might have been reasonably expended by O. C. Peterson or William A. Peterson in and about the necessary care of the premises, and for the payment of taxes, assessments, etc., and for any payments upon the principal or interest of the mortgage for \$7,500 made to Prescott & Burch; and also to take an account of the rents and profits which had come into the hands of any of the defendants, which said rents and profits should be deducted from the total amount found due from complainant. The decree further ordered that within 30 days after the coming in and confirmation of said master's report the complainant should pay the sum found due from him upon said accounting, less his costs; that upon each payment being made by him, evidenced by the receipt of the clerk of the court, said William A. Peterson should execute a good and sufficient deed of conveyance of the premises to complainant, etc., and the defendants should deliver up to complainant all deeds, writings, etc., in their custody or control which in any way related to said premises; that in case of default of said William A. Peterson, upon presentation to him of said receipt of the clerk, to execute said deed after three days, said deed should be executed by the master; and that in default of complainant paying said sum so found due from him within said 30 days complainant's bill should stand dismissed.

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

The thirty-nine errors assigned by the defendants can be substantially included, we think, in the following: (1) The court erred in entering the decree appealed from, and in not dismissing complainant's amended bill for want of equity. (2) The Court erred in holding that the agreement between O. C. Peterson and complainant, the assignment of the certificate of sale to O. C. Peterson and the issuance of the deed thereon amounted to an equitable mortgage of the premises, and in not holding that said agreement was an absolute assignment of the certificate with an option to re-purchase on or before October 24, 1910. (3) The court erred in entering a decree which deprived William A. Peterson of the fee simple title in said premises, but provided for a conveyance of said fee simple title to complainant upon oral testimony, the Statute of Frauds having been pleaded and relied upon."

After careful consideration of the evidence and of the briefs and arguments of the respective counsel we are of the opinion that the decree is fully warranted by the evidence and the law, and does equity between the parties and should be affirmed.

The decision of the case depends principally upon the effect of the verbal agreement made by complainant and O. C. Peterson at the time the former assigned the certificate of sale to the latter. At that time there was an indebtedness existing from complainant to O. C. Peterson, evidenced by a judgment. If the agreement was that O. C. Peterson would hold the certificate as security for that indebtedness and for what he should pay to get the certificate released from the Chicago City Bank, and for what he should further pay in order to release the property from the tax sale, and for other items (and such appears to have been in

substantive the agreement), then the procurement of such certificate by O. C. Petersen and the subsequent issuance of the same thereon should, so think, under the circumstances, be treated as an equitable mortgage, and complainant should be entitled to redeem therefrom. (Trevelyan v. Trevelyan, 124 Ill. 144; Shane v. Lane, 86 Ill. App. 414, 424.) O. C. Petersen did not deny the agreement or that complainant was entitled to redeem, but he claimed that a time limit was fixed for this redemption by complainant at October 24, 1910, which was the time when a master's deed under said certificate could be due. He testified that he agreed to take up the certificate and pay the taxes and the interest, and that he would turn the property back to complainant upon the latter reimbursing him for the amounts advanced with interest, plus the amount due on his judgment and payment for his trouble in the matter and payment of \$25 per month while complainant occupied a flat in the building, provided complainant would refrain "or pay all these amounts before October 24, 1910." Gallagher, complainant's attorney, testified that after his return to Chicago and after said agreement had been made he had an interview with O. C. Petersen, at which time he reproached O. C. Petersen for dealing with his client directly and during his absence, and that O. C. Petersen replied: "Well, I don't want the property, Gallagher; don't get excited and talk that way about it. My only object is taking over the certificate and to make sure that I collect that judgment; * * that is all I want; * * if we can sell the property, all right; if I can sell and get the amount of that judgment, and what I have invested, with interest on it, that is all I want." Gallagher further testified to the effect that he several times endeavored to have the verbal agreement between complainant and O. C. Petersen put in writing, but that the latter refused so to do and further refused to render an itemized statement of what he claimed was owing him by reason of the transaction. Complainant denied

that it was verbally agreed that a time limit within which he might redeem was fixed at October 31, 1910. But whatever the fact as to a time limit may be we do not think that, under the circumstances of this case, it makes any material difference. It does not appear that complainant intended to sell the certificate with an option to re-purchase. The certificate was worth about \$5,000 and represented what in labor and materials complainant had put in the buildings. C. C. Peterson did not pay complainant any money. He only paid the amount for which the certificate was held as collateral at the bank, the amount necessary to redeem from the tax sale, and certain other agreed items, and he also obtained security for his \$500 judgment, which it appears he could not otherwise collect. All these amounts were charged up against complainant and it appears that they remain as liabilities of the complainant. They were not paid by the transfer of the certificate. In Keithley v. Toom, 181 Ill. 308, 309, it is said: "If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left existing, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing, and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulation they may have inserted in the instruments." In Allen v. Allen, 242 Ill. 512, it was decided that, where a party furnished the money to redeem another's land from a sheriff's sale and obtains the certificate of purchase and sheriff's deed under an agreement that he will convey the land to the other when the amount so furnished is repaid, the relation



of debtor and creditor exists between the parties and the certificate of purchase and sheriff's deed are in the nature of a mortgage. In Halbert v. Turner, 233 Ill. 531, 534, the court said: "The agreement that if Moore did not pay within the time fixed by the agreement the deed should be absolute was inoperative, for the reason that parties cannot make a conveyance of land absolute in form as security for the payment of money by a given day, and provide that if payment is not then made the deed shall be an absolute conveyance. If an instrument is a mortgage of lands it remains a mortgage until the right of redemption is barred by some of the modes acknowledged by the law, and the right of redemption cannot be cut off by an agreement of the parties. Bearse v. Ford, 108 Ill. 16." Furthermore the evidence in the present case discloses that O. C. Peterson had not, on October 24, 1910, done all the things agreed to be done by him under said agreement.

There is evidence in the record tending to show that O. C. Peterson acted in collusion with the Ohsans in the whole transaction. When he obtained the certificate from complainant the time for the Ohsans to redeem the premises had expired, but judgment creditors had until October 24, 1910; and after the master's deed had been issued to O. C. Peterson's brother, William A. Peterson, the Ohsans continued to collect the rents from the premises without making any proper accounting.

And we do not think there is any merit in counsel's point as to the Statute of Frauds. In Linkenbach v. Knapp, 235 Ill. 473, 480, it is said: "It has often been held by this court that a deed absolute in form, if intended as a security, is in equity but a mortgage and will be treated and enforced as such, even though the agreement for redemption rests only in parol and notwithstanding the Statute of Frauds."

The decree of the Superior Court is affirmed.

AFFIRMED.

DESPAINES SAFETY DEPOSIT
COMPANY, a corporation,
Defendant in Error,

vs.

CHARLES J. HOUR,
Plaintiff in Error.

FILED TO MUNICIPAL COURT
OF CHICAGO.

Charles C. Fairman and Frank B. Harriman,

1921 A. 569

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought by defendant in error, Desplaines Safety Deposit Company, hereinafter called plaintiff, against C. C. Fairman, F. B. Harriman and Charles J. Hour, plaintiffs in error, hereinafter called defendants, to recover rent under the terms of a lease hereinafter described for the months of September, October, November and December, 1913.

✓ Attached to the statement of claim filed in the cause is a copy of the lease on which the action was brought. The lease bears date of April 13, 1913, and was made and executed by the plaintiff as lessor to the Acme Brass & Aluminum Foundry Company, lessee, devising premises known and described as the fourth and fifth floors of a building known as No. 617-619 Fulton street in the city of Chicago, to be occupied for machine shop and brass and aluminum foundry and nickel-plating plant, for the term commencing May 1, 1913, and ending April 30, 1914. The lessee, in consideration of the devise, covenants and agrees to pay as rent for the premises the sum of \$1380 in monthly installments of \$115 each, in advance upon the first day of each and every month of said term. The lease was signed by the lessor by its president and was signed by

the Acme Brass & Aluminum Foundry Company by C. C. Fairman, President, C. C. Fairman, W. B. Harriman and Charles J. Bour.

The Acme Brass & Aluminum Foundry Company, as, at the time of the execution of the lease in question, in process of organization as a corporation under the laws of the State of Illinois. A certificate of complete organization was issued on May 3, 1913, by the Secretary of State of the State of Illinois, and was filed for record in the Recorder's office of Cook County, Illinois, the county in which the principal office of the corporation was located, on October 21, 1913.

The defendant, C. C. Fairman, failed to file an amended affidavit of merits as ordered by the court and judgment was entered against him by default, and he has not joined in the assignment of errors herein. Service of summons was never had upon the defendant Harriman, and he has never appeared in the proceedings either in this court or in the Municipal Court. The defendant Charles J. Bour was served with summons, appeared and defended the suit in the Municipal Court, where, at the conclusion of the trial, the jury were instructed to find the issues for the plaintiff and assess the plaintiff's damages at the sum of \$315, and judgment was thereupon rendered upon the verdict for \$315 against the defendants Bour and Fairman. Bour alone prosecutes this writ of error.

There is no controversy as to the facts in this case. An agreed statement of facts was made in the court below and read to the jury. There was further offered the evidence of J. Farley Bradley and Charles J. Bour. The testimony of neither witness was controverted.

Upon the issues formed the plaintiff in error seeks to raise, and most strongly urges, the question that the lease sued on was ultra vires, and that the plaintiff had no power under its certificate of incorporation or under the law, to own the premises in question or to make a lease thereof, and that such alleged want of power can be pleaded as a defense to the action for rent.

The facts upon which it is sought to reverse the judgment and to defeat the action on the lease are that the plaintiff is a corporation organized under the laws of the State of Illinois to erect, maintain, operate and manage safety deposit vaults; that the premises devised in the lease are two floors of the building owned by the plaintiff and fronting on Fulton street. This building constitutes an L of the plaintiff's main building which fronts on North Desplaines street. The building fronting on both streets was purchased by plaintiff in 1906. At about the time of the purchase the plaintiff bricked up certain arch-ways in the wall between the main building and the L fronting on Fulton street, thus making a solid wall between the sections of the building, and that that condition continued up to the time of the execution of the lease in question and during the term thereof. The plaintiff, since acquiring the building, has occupied a portion thereof fronting on North Desplaines street for its corporate business, but has never occupied any part of the building fronting on Fulton street. It has always leased its tenants for warehouse and factory purposes the Fulton street L. The building is six stories high and the vaults used by the plaintiff extend through three stories of the building. ✓

In our opinion the position of defendant here is clearly untenable under the settled law of this State. Rector

v. Hartford Deposit Co., 190 Ill. 380, cannot be distinguished in principle from the case at bar. So far as the facts in the Rector case are concerned there was in that case a such greater disparity as to the actual size of the building and the space actually occupied by the lesser for its direct corporate purposes. So attach no importance to the fact that the part of the building in which the safety vaults are located and the part in which are situated the leased premises have been separated by a wall. The closing of the arches is entirely immaterial. Under the Rector case, supra, we think that the abuse of the power of the corporation, if there be any such abuse, cannot be raised and availed of as a defense in a proceeding wholly collateral to the question of the right and power of the corporation in the premises. In National Home Building & Loan Association v. Home Savings Bank, 181 Ill. 35, cited and relied upon by counsel for plaintiff in error, the corporation was not organized under the general corporation act which permits corporations to own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, but it was organized under the homestead loan association act of 1879, which contains no such general grant but expressly limits such associations to the purchase of real estate upon which they hold mortgages or other liens, or in which they have an interest. The distinction between such a case and the Rector case, supra, is obvious. While a building association has power only of purchasing such real estate as it has an interest in as creditor or otherwise, a corporation organized under the general act, under which the plaintiff was organized, may purchase real estate where necessary for its corporate purposes. Its power in any given case necessarily depends upon a multiplicity

of facts considered with reference to its entire corporate activities, thus calling for an inquiry so extensive in scope as to be practically inconvenient, if not impossible, of pursuit, except in a proceeding devoted primarily to that end; whereas a building association has only the power indicated above, and in each case the inquiry is comparatively simple as to whether it possesses the interest in real estate required by the statute before acquiring it. For like reasons the case of Best Brewing Co. v. Klassen, 185 Ill. 37, is not applicable.

A further defense is sought to be set up based upon the following facts appearing in the record. At the time the lease in question was executed and delivered there was no corporation in existence known as the Acme Brass & Aluminum Foundry Company. Its certificate of incorporation was not issued by the Secretary of State until nearly a month later, and such certificate was not recorded until five months thereafter. Until the certificate had been issued and filed for record there could be no corporation in existence capable of executing the lease. It was accordingly executed by the proposed officers and stockholders of the corporation then being organized. It is the law of this State that parties doing business under a corporate name are bound at their peril to see to it that the corporate organization is complete; otherwise they assume a personal and individual liability. In Seeburger v. McDonnick, 178 Ill. 414, the court, referring to Bigelow v. Gregory, 75 Ill. 197, and Loverin v. McLaughlin, 161 Ill. 417, said: "In these cases this court held in substance that persons, who associate themselves together by articles of agreement to become a corporation but do not comply with the law so as to become a corporation, will be liable as partners for contracts made by them in the name assumed as the corporate name. In the Loverin case they were held liable under the statute of this State and it was also

there said they were liable independently of the statute."

We think the argument of counsel for defendant, that Section 18 of the Corporation Act is a penal statute and should be strictly construed, and, as thus construed, the cause of action sued upon in this case is not such a liability as is intended by Section 18, is unavailing.

It is further urged that the liability created by the lease was not made when the lease was executed and did not arise until the monthly instalments of rent became due and payable on the first day of each month as provided in the lease. We do not regard this position as tenable or the authorities cited in support thereof as having any application.

Beyond the special statutory liability and the general liability imposed by law for lack of compliance with the statutory requirements in the matter of organization of corporations, we regard the lease in question, which was signed by plaintiff in error, four, as an agreement binding upon him. It may be freely conceded that the mere signature to an instrument of a party not therein named or referred to as lessee does not obligate him necessarily as a tenant. But the lease before us was made to the Acme Brass & Aluminum Foundry Company, which might indicate a partnership as well as a corporation. Inasmuch as the plaintiff in error and his associates were doing business under that name, and were by law liable as partners, the lease in question is simply an ordinary partnership contract. In the body of the instrument the firm name only is given, but the signatures are the names of the individual parties. Such a contract has frequently been held valid though informal. (Witner v. Whitlock, 88 Ill. 513; Grevfus & Co. v. Union National Bank, 164 Id. 83.)

We find no error in the instruction given by the

court directing the return of a verdict for the sum of \$316. There was no controversy of fact to be submitted to the jury, and the court properly exercised its power to decide questions of law by directing the verdict.

We find no material error in the record, and the judgment is affirmed.

RECORDED.

139 - 20483

HENRY L. NEWHOUSE,
Defendant in Error,

vs.

JAKE LEVANOS, *and*
Plaintiff in Error.

vs. Charles

THE MUNICIPAL COURT

1921 A. 373

MR. JUSTICE SMITH DELIVERED HIS OPINION OF THE COURT.

An action of forcible entry and detainer was instituted in the Municipal Court by Henry L. Newhouse, defendant in error, against Jake Levanos and Jos. Chazales, to recover possession of certain premises described in the complaint for non-payment of the rent for March, 1914. The summons was served upon the defendant Jake Levanos only; and on the trial a finding and judgment were entered against him. Jake Levanos prosecutes this writ of error to reverse the judgment.

The record shows that there was no payment or tender of the rent for March, 1914, on the first day of March when it was due by the terms of the lease. It appears from the evidence that the first attempt made by the defendants or either of them to pay the rent was on March 9th, eight days after defendants had defaulted in this respect under the terms of the lease. On the last mentioned date, the defendants, Lessees, through one Charles Levanos, a brother of the plaintiff in error, offered the lessor less than one-third of the amount due, which he refused to accept, and informed Charles Levanos that negotiations with reference to the March rent were in the hands of his attorney, J. H. Flawana. After this conversation with plaintiff, Charles Levanos called on plaintiff's attorney and asked for further time to pay the rent. This was refused and immediate payment was insisted upon. The rent was not paid

and the action above mentioned for possession of the premises was thereupon started.

The lease between the parties appearing in the record contains the following clause:

"It is expressly agreed between the parties hereto that if default be made in the payment of the rent above reserved or any part thereof, or in any of the covenants and agreements herein contained, to be kept by the party of the second part, it shall be lawful for the party of the first part or the legal representatives of said party at any time thereafter, at the election of said first party or the legal representatives thereof, without notice to declare said term ended and to re-enter said demise premises or any part thereof either with or without process of law, * * * said party of the second part hereby expressly waiving all right to any notice or demand under any statute of this state relating to forcible entry and detainer."

The lease also contained the following provision:

"Nor shall the receipt of said rent or any part thereof or any other act in apparent affirmance of the tenancy operate as a waiver of a right to forfeit this lease and the term hereby granted for the period still unexpired for any breach of any of the covenants herein."

After suit was started the defendants through their attorney tendered the rent in open court with court costs. This tender was refused. The money tendered was not paid into court. After hearing the evidence the court below found the defendant, Jake Levandos, guilty of unlawfully withholding possession of the premises in question from the plaintiff, and entered judgment on the finding.

A reversal of the judgment is asked upon three grounds: (1) that the court permitted the plaintiff to introduce in evidence a lease over defendant's objection that it did not appear that it was signed by the plaintiff or any one authorized by him; (2) that the record does not show any evidence of any notice of any kind prior to the commencement of the suit; and (3) that the rent due March 1st was tendered on

March 12th, 1914.

As to the first ground urged, the lease was introduced in evidence without objection made by the defendants, and objection was not made to receiving the lease until an adjourned hearing of the case was in progress. There was no denial in the record of the execution of the lease, either by affidavit or testimony. The plaintiff in error entered under this lease, paid rent under it, and we think there is no basis in the record for making any fair or valid objection to the validity of the lease or its proper reception in evidence.

As to the question of notice or service of demand on the defendants below, we think there is no basis for a reversal of judgment for the want of such service of notice or demand. Notice and demand were expressly waived in the clause of the lease above quoted. We regard it as a sufficient answer to this contention that the question of notice or demand was not drawn in issue on the trial of the case in the court below. Counsel for plaintiff in error announced at the opening of the trial that the record might show "that the defense to this case is a tender of the rent that was due before the forfeiture had been declared in this suit." (Thomasson v. Wilson, 146 Ill. 354; Hayward v. Scott, 114 Ill. App. 531). Provisions in the lease of the parties, waiving requirement of any notice prior to the bringing of suit for possession of premises, are upheld in Selinski v. Brand, 76 Ill. App. 404; Keen v. Minchcliffe, 131 Ill. 468; Penyon v. Lanley, 125 Ill. App. 615.

The only other ground of defense to the action was the claim of tender of the rent made by the defendant. There was no proof made of a valid tender of the rent for the month of March, 1914, prior to the date that the default was declared. An insufficient tender was made on the ninth day of

March of only \$40 on account of the March rent. This the plaintiff refused to take and so informed the plaintiff in error or his agent. Suit for possession was started on March 10th. The subsequent tender was refused and the tender was not kept good by deposit in court. The plaintiff's right to a judgment for possession of the premises in question was not affected by the offer made in court to pay the March rent together with court costs. The defendant, plaintiff in error, had then defaulted and the suit for possession was rightfully commenced by the plaintiff. We find no error in the record and the judgment is, accordingly, affirmed.

AFFIRMED.

MARK F. MADDEN and MICHAEL S.
MADDEN, copartners, doing business as MADDEN BROS.,
Defendants in Error,

vs.

MAUD R. DAVIS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1921A.575

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought by Mark F. Madden and Michael S. Madden, copartners, hereinafter styled plaintiffs, against Maud R. Davis, hereinafter called defendant, for \$1000 commissions on the exchange of real estate between the defendant Davis and one E. L. Wells. A trial was had in the Municipal Court of Chicago before the judge and a jury, resulting in a verdict of \$400 against the defendant Davis, upon which verdict judgment was rendered.

It is urged as a ground for reversal that the plaintiffs' suit was brought upon a written contract, dated September 19, 1910, signed by the defendant and her husband and one E. L. Wells; that the plaintiffs were not parties to the contract and the contract was not made for the benefit of the plaintiffs, and, hence they have no right of action upon it. It is clear that the contract set up in the statement of claim is not a contract made for the benefit of the plaintiffs. Their commissions in the real estate deal, evidenced by the contract, was merely incidental; the purpose and object of the contract were not for their benefit, but for the benefit of the parties to the contract. If the action was brought upon that contract, under the authority of Grandall v. Layne, 154 Ill. 627, the action

would fail, but we think that the statement of claim sets out sufficient to apprise the defendant that the action is for \$1000 commissions on the exchange of real estate between the defendant and E. L. Wells. The statement of claim thus set forth a cause of action and apprises the defendant of the nature of the claim sued upon. The mere fact that the statement of claim proceeds to refer to and set up a written contract between the defendant and Wells, a mere evidentiary fact in the case, does not convert the action into an action upon the written contract. We think, therefore, that the action is brought upon the parol agreement made by the defendant to pay the plaintiffs \$1000 commission for the sale or exchange of her property, and not upon the alleged written contract between the defendant and Wells.

It is urged that the evidence shows that the plaintiffs were brokers and not mere middlemen in bringing the parties together, and that the plaintiffs acted for both parties to the contract and were to receive commissions from both parties, hence, their action was contrary to public policy and they cannot maintain an action for commissions. In support of this contention Wahner v. Herron, 165 id. 242, and Munn v. Keach, 214 id. 259, are cited. It must be conceded that a man cannot serve two masters it is as well established in law as in morals, and that on the ground of public policy an agent who attempts to serve two masters, without informing his principal that he is an agent for both seller and buyer at the same time, and is expecting a commission from both, cannot recover commissions. While the rule is founded on the principle of good morals and public policy, the authorities announcing the rule do not apply it where both parties had notice that the agent was acting for both seller and buyer

and consented to it. ✓ One of the controverted questions of fact in this case is whether the defendant Davis knew that the plaintiffs were acting as agents for Wells as well as for the defendant. The testimony of the plaintiffs is that they so informed the defendant. The defendant denies the statement and claims that she did not know that the plaintiffs were the agents for Wells. The contract, however, which the defendant signed with Wells contains the following agreement:

"It is further mutually agreed that brokerage fees or commissions shall be paid to Ladden Brothers by party (1st part, \$1000), (2nd part, \$1250), by the respective parties hereto as heretofore agreed above."

The jury evidently believed from the evidence that Mrs. Davis knew of the fact that Ladden Brothers, plaintiffs, were acting for and expecting a commission from Wells. The defendant is presumed to know what she signed, and the fact that she signed the contract containing the clause above quoted is convincing evidence that she knew of the arrangement by which the plaintiffs were to receive commissions from both parties to the contract. This question we regard as the most serious question in the case, but we cannot say, upon the evidence shown in the record, that the verdict of the jury on this question was contrary to the manifest weight of the evidence.

✓ A further ground for reversal is that the plaintiffs misrepresented to the defendant the depth of the property on Langley Avenue, Chicago, which they were proposing to have the defendant take in exchange for her farm in Carter County, Missouri. The evidence tends to show that the plaintiffs represented to the defendant that the Langley Avenue property was 125 feet deep. The property was so noted in the

plaintiffs' memoranda kept in their office, and it appears that the maps in use showed the property to be 125 feet deep. The original plat showed that the property was 125 feet deep, but it appeared from the evidence that six feet off the front of the property had been dedicated to widen Langley Avenue many years before the transaction here in question, so that the lots were really six feet less in depth than the defendant was led to suppose.

And we do not think the evidence shows that the plaintiffs intentionally deceived the defendant as to the depth of the lot. The evidence shows that the plaintiffs gave the defendant full description of the property as it was written on their filing card, and that they went to their real estate atlas to ascertain the correctness of the description and found that the card tallied with the atlas. Even the plat in the Recorder's office did not show the exact dimensions of the property. ✓ In view of all the facts shown in the record, we cannot say that the verdict of the jury was manifestly against the weight of the evidence upon the question as to whether the plaintiffs made knowingly or carelessly false representations of the Langley Avenue property to the defendant. The defendant inspected the vacant space from the rear porch of the building to the alley line, and evidently did not rely upon the statements of the plaintiffs with reference to the depth of the property.

It is urged that some of the instructions given by the court to the jury were erroneous. We have considered the series of instructions given by the court, and while some of them are not free from just criticism, we do not think that they contained reversible error. Upon the whole, the instructions fairly submitted the case to the jury.

The judgment is affirmed.

AFFIRMED.

227 - 20549

CHARLES B. ENSIGN,
Plaintiff in Error,

vs.

JOHN LEHMANN and LENA LEHMANN,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1921 A. 578

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Judgment was confessed on a promissory note for \$200, payable to the order of E. C. Martin six months after date, with interest at the rate of 7% per annum after maturity until paid, in favor of the plaintiff Ensign and against the defendants below. Subsequently, on motion, the judgment was set aside and the defendants were permitted to make their defense. ✓ The affidavit of merits filed by them sets up that the note was obtained by Martin, the payee, by fraud and circumvention practiced by him upon the defendants, and that the defendants were induced to sign the note by trickery, artifice and deceit and by fraudulent representations and false promises made by Martin; that the consideration for the note wholly failed.

The issues were tried by the court without a jury, and the finding of the court was against the plaintiff Ensign, and judgment was entered on the finding. No propositions of law were submitted to be held by the trial court, consequently the only question before this court is whether the evidence sustains the finding and judgment of the trial court.

It appears from the evidence produced on the trial that Ensign, the plaintiff below, was at the time of the trial and had been for some fifteen years a banker and note broker in the city of Chicago. His business consisted principally in buying and selling commercial paper. Early in the summer of 1912 one

Dr. Martin, with whom he had never had any business dealings but who had been referred to the plaintiff by some friend, requested the plaintiff to purchase various notes which Martin then held. At the second meeting between plaintiff and Dr. Martin a list of notes was left with the plaintiff and, after investigation, notes which the plaintiff felt were unquestionably good were purchased. The note sued on was purchased by the plaintiff, as the evidence tends to show, after investigation by the plaintiff as to the financial standing of the defendants. It was endorsed by Dr. Martin to the plaintiff and the plaintiff paid him therefor by cash or by check about five months before the note matured.

The evidence tends to show that when the note was purchased by the plaintiff he knew of no facts which would put him on guard, or suggest to him that there was anything wrong with the note. The note in question came to him in the ordinary course of his business. The note was given for professional services rendered to the Lehmanns by Dr. Martin.

It appears from the examination of the attorney for the defendants that he had written several letters to the plaintiff, the first of which was dated February 20, 1913, six months after the plaintiff had purchased the note. In this letter an extension of time was requested of the plaintiff and a promise was made that payment would be made on March 15th. The letter was to the effect that the defendants understood that they had no defense against the plaintiff's claim, and that they would be ready to meet their debt just as soon as circumstances would permit. A further extension of time was asked in a letter dated March 20, 1913. ✓

The evidence for the defendants fails to show any fraud or circumvention which misled the makers of the

note, the defendants, as to the nature of the instrument which they were signing. If the instrument signed by the makers is not prejudicially different in legal effect from the instrument they were willing to sign and thought they were signing, there was no fraud or circumvention. (Exchange Natl. Bank v. State, 69 Ill. App. 488; Hetcalf v. Draper, 98 id. 399-405). The evidence shows that the defendants knew that they were signing a note for \$200, payable in six months, and that they intended to sign such a note. The defense of fraud and circumvention set up in the affidavit of Merits was not proven; nor was there any evidence tending to prove it as against the plaintiff, who was a holder of the note in due course. (Read v. Munson, 60 Ill. 49; Swannell v. Watson, 71 id. 406; Connolly v. Lehmann, 232 Ill. 178.)

✓ The only evidence on the part of the defendants which is even remotely material to the question of fraud and circumvention in the execution of the note, is the testimony of defendant, Mrs. Lehmann, that she did not see the warrant of attorney contained in the note because of Dr. Martin's action in keeping a blotter over the face of the note. She testified, however, that Martin removed the blotter so that she could see the face of the note, and she, as well as her husband, admitted on cross-examination that they knew they were signing a note for \$200, payable at the First National Bank of Chicago in six months, with interest at 7% per annum after maturity, so that there was no fraud, circumvention or deceit as to the nature of the instrument which they actually signed. If Mrs. Lehmann did not know that she signed a judgment note, this lack of knowledge did not prejudice her in the least since the judgment confessed by means of the warrant of attorney was vacated and a trial on the merits given the defendants. More-

over, if Dr. Martin kept a blotter over the warrant of attorney, due care required of the defendants that they demand an opportunity to read the note. Taking the testimony of Mrs. Lehmann as true, the case falls within the facts of Connolly v. Baumann, supra, where it is said: "They may have signed the papers without knowing what they were and without due care, but they do not say that Mackinlay said the papers were different from what they actually were * * *."

In order to establish a misrepresentation in law there must be proved a statement of fact which was untrue and which was known to be untrue to the maker of the statement. (Miller v. Sutliff, 241 id. 521; Grubb v. Milan, 249 id. 456). The statements of Dr. Martin shown in the evidence, that he was a specialist and cured chronic diseases, that the defendants, Mr. and Mrs. Lehmann, were ill and had certain ailments, and that he, Dr. Martin, could cure them, are the representations which it is claimed constituted the misrepresentations and fraud. Such representations under the above authorities do not tend to prove the affirmance of a fact which is untrue. It does not amount to an assertion of a fact. It was only an agreement to do something in the future, and even though the promise to do something in the future was not intended to be performed by Dr. Martin, that does not constitute a fraud in law under the authorities cited. "If an intention not to perform constituted fraud, every transaction might be avoided where the facts justified an inference that a party did not intend to pay the consideration or keep his agreement. A mere breach of a contract does not amount to a fraud, and neither a knowledge of inability to perform, nor an intention not to do so, would make the transaction fraudulent." (Miller v. Sutliff, supra.)

No evidence was introduced by the defendants to sustain the allegations of the affidavit of merits that the consideration for the note in question failed. There is no evidence to the effect that the defendants were not cured or that the failure to cure was due to the omission of Dr. Martin to properly prescribe, or that the medicines given by Martin were worthless or detrimental to the defendants.

The evidence shows very clearly that the plaintiff is a holder of the note in due course of business and, as such, took the note free from the defenses attempted to be proved by the defendants.

The evidence does not sustain the finding and judgment of the court below. The judgment is, accordingly, reversed and judgment is rendered here in favor of Charles B. Ensign, plaintiff in error, and against John Lehmann and Lena Lehmann, defendants in error, for the sum of \$231.50.

REVERSED AND JUDGMENT HERE.

227 - 20549

FINDING OF FACT.

The court finds that the defendants in error, John Lehmann and Lena Lehmann, are indebted to Charles B. Ensign, plaintiff in error, upon the promissory note sued on, in the sum of \$231.50; that said Ensign is a holder of said note in due course for value without notice of any defense available to defendants in error, and that there was no fraud and circumvention employed in the execution of the note.

Wm. Lloyd Garrison

1000

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a decree of the Circuit Court of Cook County, entered on June 25, 1912, in the case of defendant in error, Annie Bell, vs. the plaintiff in error.

✓ The defendant in error, Annie Bell, filed her bill of complaint as the owner of a lot against plaintiffs in error for the removal of certain clouds on her title. The defendants were served with summons and appeared. Plaintiff in error, Brogren, answered the bill on June 28, 1910. The two Fergusons demurred to the bill. Plaintiff in error, Brogren, filed a cross-bill against Bell and the two Fergusons and Charles R. Wakely. Wakely answered the cross-bill.

On March 13, 1911, the demurrers of the Fergusons to the bill were sustained and complainant Bell was given ten days to amend. April 15, 1911, after the time to amend had passed, the solicitor for plaintiffs in error, the Fergusons, appeared in court and, without notice to opposing counsel, obtained an order dismissing the original bill as to the two Fergusons. Six days later an amendment to the bill was filed, the only purpose of which was to change the word "warranty" to "quitclaim" and bring into the bill copies of certain deeds as exhibits.

On November 23, 1911, the solicitors for defendant in error, Bell, gave notice of a motion to vacate the order dismissing the bill as to the Fergusons, to be heard when the cause should be reached for trial. The Fergusons were then in the case as defendants to the cross-bill of plaintiff in error, Brogren, and remained in said case as such defendants until the final decree.

On the day on which the cause was reached for trial, as appears by the final decree, the cross-complainant below, Brogren, plaintiff in error, failed to appear and the cause was heard and the decree of June 25, 1912, was entered.

Subsequently, on July 1, 1912, plaintiff in error, Brogren, and the Fergusons as defendants to the cross-bill, moved to vacate the decree. This motion was denied on July 6th. Later the court granted leave to the same parties to file a motion for rehearing and to vacate the decree. This motion was also denied.

Various errors are assigned, several of which presented similar questions and may be considered together. Assignments of error, Nos. 1, 2, 12 and 15, seek to raise the question as to the jurisdiction of the Honorable Jesse A. Baldwin, one of the Judges of the Circuit Court, to hear and determine the cause, growing out of what is alleged to be the fact in the briefs that the cause was regularly on the trial calendar of Honorable Nickham Scanlan, who was regularly assigned to hear chancery cases in the Circuit Court, and that without any order or proceeding entered of record, the cause was put upon a trial calendar to be heard and determined by His Honor Judge Baldwin. In support of the position that Judge Baldwin had no right to hear and decide the cause and enter the decree in question, the

rules of the Circuit Court of Cook County are cited.

Upon an examination of the record, we find no basis therein for the facts relied upon to support the errors in question, except what appears in what is termed the "bill of exceptions," signed by His Honor Judge Baldwin. Treating this so-called bill of exceptions as a certificate of evidence, we find that it contains no evidence. It appears to be a recitation of some proceedings in the court, among which appears a calendar of cases assigned to be heard before Judge Baldwin, and a list of cases in which contested motions were to be heard, and a recitation of certain motions above referred to, which otherwise appear in the record. The document contains no affidavits or proof of any kind and does not in any wise fulfill the functions of a certificate of evidence. In Ames v. Stockhoff, et al., 73 Ill. App. 427, appears a very full review of the Illinois cases upon the function of a certificate of evidence in chancery causes. In that case, among other cases, Flaherty v. McCorsick et al., 123 Ill. 525, is cited and the following quotation is made from the opinion in that case:

"The sole office or function of a certificate of evidence in chancery causes, as its very name implies, is to truly set forth the evidence offered, rejected, received and considered on the hearing, and any attempt to make it subserve some other purpose is without warrant of law."

In Van Pelt v. Dunford et al., 58 Ill. 146, the Supreme Court held that affidavits in support of a motion for a new hearing in a proceeding to enforce a mechanic's lien were not a part of the record unless made so by a certificate of evidence, and that in the absence of a certificate of evidence, the court would not presume from the mere fact that the affidavits were found among the files of the cause, that the same were read to the court.

The rules of the Circuit Court referred to in

argument in support of the assignments of error nowhere appear in the record before us. We cannot know, therefore, what those rules are, and, not knowing the provisions of the rules we cannot say that any of the rules were violated by any of the proceedings of the trial court which are a legitimate part of the record before us. The facts relied upon to support the errors above named do not appear of record, and we cannot say that any of the above mentioned errors are well assigned.

It is next urged that under assignments of error, numbered respectively 3, 4, and 5, the court acted without jurisdiction of the defendants in the trial court as to whom the original bill had been dismissed. It is a sufficient answer to these assignments of error to say that the defendants Ferguson were still in court as defendants to the cross-bill of plaintiff in error, Brogren, and the court had jurisdiction of the defendants as well as of the cause when it passed upon the motion of defendants in error to vacate and set aside the order dismissing the original bill as to the defendants, the Fergusons.

It is further contended that the decree under review exceeded the scope of the motion to grant leave to defendant in error Bell to amend her bill. As above suggested, we cannot look to the so-called "bill of exceptions," or certificate of evidence, for any support to this contention. The decree itself shows that it was entered on June 25, 1912, when the cause came on to be heard upon the pleadings and evidence. It does not appear from the record that the decree was entered upon the motion made by the defendants in error or upon the call of the contested motion calendar. Looking at the decree, it appears that the cause was reached regularly for hearing, and that the plaintiffs in error failed to appear and make any proofs, and the decree against them was entered.

It is further urged as a ground of reversal that the court erred in requiring plaintiff in error Brogren to answer the amended bill instanter while the cause was on the contested motion calendar, and on a motion in which plaintiff in error was not concerned. This contention is based upon facts which are not shown by the record. It does not appear from any part of the true record before us that the rule was made or the decree entered while the cause was on the contested motion calendar. The contrary appears from the face of the decree.

It is further urged that the cause was forced to trial out of its order. Nothing in the record justifies or supports this contention except what appears in the so-called "bill of exceptions," or certificate of evidence, which we hold preserves nothing in the record which a certificate of evidence is designed to supply.

The motions which were made subsequent to the decree to vacate the decree appear of record. The affidavits contained in the record were not made a part of the record by the certificate of evidence, hence we cannot look to those affidavits for any facts and all errors based upon the rulings of the court with reference to those motions must be regarded as not well assigned.

The decree has sufficient findings contained in it to support it, and we find no error properly preserved in the record for which the decree should be reversed. The decree is affirmed.

AFFIRMED.

Introduction

1. The purpose of this study is to investigate the effects of various factors on the growth of a certain plant species.

2. The study was conducted over a period of six months, from January to June.

3. The results of the study are presented in the following sections.

4. The study was supported by the National Science Foundation.

5. The study was conducted by the Department of Biology.

JOSEPH H. HEDMARK,
Plaintiff in Error,

vs.

CHICAGO RAILWAY COMPANY,
a corporation,
Defendant in Error.

APPEAL TO MUNICIPAL COURT
OF CHICAGO.

1921 A. 584

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought by plaintiff in error against defendant in error for damages alleged to have been sustained by reason of the negligence of defendant in error.

At the conclusion of the plaintiff in error's evidence on the trial, the court, on motion of the defendant in error, instructed the jury to return a verdict in favor of the defendant in error, which the jury did, and the court rendered judgment on the verdict.

✓ Plaintiff in error, hereinafter called plaintiff, was driving a five-passenger automobile owned by him east on Monroe street in the city of Chicago. The automobile was entirely closed, front and sides. It had a mohair top and side curtains of cloth and isinglass, and, according to plaintiff's testimony, three-fourths at least of the side curtains was of isinglass, and it was possible to see through it.

Monroe street runs east and west and 4th avenue runs north and south. The accident occurred at the intersection of these streets. On the northwest corner of the streets was a vacant lot, which had a 3-ft. frontage on Monroe street and it extended back 60 feet on 4th avenue. North of this vacant lot and 60 feet from the Monroe street building line there was a building. On the southwest corner there was a

building which was back 35 or 36 feet from the curb-stone on Monroe street, and the width of the sidewalk 9 or 10 feet from the curb-stone on 40th avenue.

The plaintiff testified that when he was a block west of 40th avenue, he was going about 14 miles an hour and slackened up a little, and that when he got somewhere in the neighborhood,-- perhaps a little west of, the vacant lot, he looked north to see if there was a car coming and did not see any; that then he let his machine coast along and looked toward the south to see if a car was coming from that direction, and as he "straightened up, the street car was right on to me,-- nearly." He testified that when he first saw the car he was not on the car track, but was very close to it and the car was between 8 to 10 feet from him; that he then reached for his reverse lever, but before he could reach it, the street car hit the left side of the front end of the automobile, throwing it southwest. The plaintiff further stated that when he was five feet from the street car track he was going probably eight or ten miles an hour, and that going at that speed he could have stopped his automobile within three or four feet in an emergency. There were three other witnesses to the accident besides the plaintiff. There was no controversy in the evidence offered on behalf of the plaintiff.

It is urged in behalf of the plaintiff as a ground of reversal that the question of contributory negligence is one of fact and should have been submitted to the jury.

One of plaintiff's witnesses, Sullivan, was a pedestrian crossing Monroe street at 40th avenue at the time of the accident. He first saw the automobile when it was about 50 feet west of 40th avenue. The machine was then slowed down, and, after running ten feet or a little farther,

it was started up again, being at that time about 35 or 40 feet from the point of collision. He testified "as he started up, I 'hollered' at him, but do not know whether he heard me or not. I saw that he could not make it across the street before he was hit by the street car which I saw coming from the north." He further testified that when he saw the car it was about 75 or 80 feet from the point of collision. When he was asked as to the speed of the car, he said: "Well, just as I designated to you before, I had not the rate of the street car nor automobile. I could not tell you what rate they were going, but I should judge, - well, it was going at pretty fair speed, as I said before."

The witness Macley was with Sullivan on the occasion in question. He testified that he heard Sullivan "holler," and he looked up and saw an automobile approaching from the west and a street car coming from the north, "both of them going at a pretty fair rate of speed, - in just about twenty seconds the street car struck the automobile."

He further stated that the automobile was about 35 or 40 feet west of the point of collision, and the car about 75 to 80 feet north of it when he first saw them. On cross-examination the witness said that the street car was in front of the vacant lot when the automobile was 30 or 40 feet west of the place of collision.

The witness Hogan, an electrician, was climbing a pole at the southeast corner of Monroe Street and 4th Avenue for the purpose of trimming an electric light, and, "when Sullivan 'hollered' look out, I stopped and looked, and I saw the automobile and car and could see what he 'hollered' for then, and I waited for the collision." This witness agrees with the other witnesses that when he first saw the automobile

it was 35 or 40 feet west of 4th avenue, and the car was about 80 feet north of the place of the accident. ✓

It is without question the law that while street cars and other vehicles have equal rights at street intersections, this does not imply that regardless of the speed at which a street car is crossing the intersection, a vehicle is equally entitled to cross at the same moment that the car is crossing. (E. C. Ry. Co. v. Strong, 127 Ill. App. 472-473).

It is also the law that "if the facts are admitted and all reasonable minds would agree that the injury was the result of the plaintiff's negligence, the court may, as a matter of law, find there was such contributory negligence on the part of the plaintiff as to defeat a recovery, and may so inform the jury by a peremptory instruction." (Hewes v. C. & N. W. Ry. Co., 217 Ill. 600.)

Reviewing the undisputed and uncontradicted testimony given on behalf of the plaintiff, we think that all reasonable minds must agree that the plaintiff, in attempting to drive his automobile in front of the street car running south on 4th avenue, with nothing to obstruct his view and when such car was approaching rapidly, was guilty of negligence directly contributing to the damage incident to the collision between the street car and the automobile. If the plaintiff was guilty of any negligence that contributed in any degree to bring about the damage in question, he was barred from a recovery. (Brieger v. A. & C. R. R. Co., 242 Ill. 544).

✓The plaintiff made no proof of the exercise of care on his part. When he was about 50 feet west of the crossing and just before he came to the vacant corner lot, he glanced to the northeast and saw no car. His exact words were, "When I got somewhere in the neighborhood of that vacant lot, I looked up to see if there was a car coming, and did not see any;" and,

later on in his testimony he said, "When I looked north first I might have been a little west of the vacant lot. I might have been ten feet west of the line." It is evident from the testimony in the record that he could not see a car more than 70 or 80 feet north of Monroe street from the point where he says he looked to the northeast. He did not look again to the north until the car was right upon him, and yet his automobile was running from eight to ten miles an hour when he reached the southbound track. The other witnesses saw that a collision was inevitable and tried to warn the plaintiff. If he had glanced to the north a second time and from a point where he could see a car coming from the north, he would have observed the car, and the speed at which it was going, but he did not look; he did not listen; he did not hear anything until it was too late. We think that all reasonable minds must agree that the plaintiff was negligent and that his negligence contributed to the injury. As said in Schlaunder v. Chi. & Dep. Trac. Co., 258 Ill. 154-159:

"One who has an unobstructed view of an approaching train would not be justified in closing his eyes and crossing a railroad track in reliance upon the presumption that a bell would be rung or a whistle sounded. No one can assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care."

even if the ordinary signals or warnings were not given by the defendant, if the plaintiff, by exercising ordinary care, could have avoided the collision and failed to do so, he cannot recover since he was guilty of contributory negligence. As said in 29 Cyc. 506:

"The law of contributory negligence forbids a recovery by one who, by his own fault, brings an injury upon himself. Contributing negligence on the part of plaintiff necessarily assumes negligence on the part of defendant. To bar a recovery by plaintiff it is not necessary that his negligence should have been the sole cause of the injury, since contributory negligence exists if the injury be caused by the joint and concurring negligence of the person injured and defendant."

See also Calumet Iron & Steel Co. v. Martin, 118 Ill. 368-369; Flynn v. C. & N. Ry. Co., 250 Id. 460.

The question of contributory negligence or want of care on the part of the plaintiff is not to be determined by the probabilities when plaintiff looked north before he had reached the vacant lot and when he could not have seen a car much farther than 60 feet north of Monroe street, but rather by the situation when he was at such a distance before going upon the track that he could control his machine and avoid the danger from the approaching car. (Realy, Adm. v. C. & N. Ry. Co., 183 Ill. App. 293-297; C. & N. St. L. Ry. Co. v. Balsey, 133 Ill. 248).

We are of the opinion that the only reasonable inference that can be drawn from the facts is, that the plaintiff failed to exercise ordinary care at the crossing in question, and in consequence thereof his automobile was damaged. It was, therefore, the province and duty of the court to find as a question of law that the plaintiff was guilty of contributory negligence and to instruct the jury accordingly.

The judgment of the Municipal Court is affirmed.

APPROVED:

19074
3 - 19074.

PETERSON & KIMBALL COMPANY, a
corporation,

Defendant in Error,

vs.

WILLIAM A. THOMPSON et al.,
Defendants,

EDWARD H. MARHOEFER,
Plaintiff in Error.

VENUE TO

MUNICIPAL COURT

OF CHICAGO.

1921 A. 589

MR. PRESIDING JUSTICE HANES
DELIVERED THE OPINION OF THE COURT.

Defendant in error instituted suit in the Municipal Court against William A. Thompson, Wellington T. Stewart and Edward H. Marhoefer to recover \$100.00, upon an account stated. Service of process was had upon Thompson, who, having defaulted, judgment was rendered against him for the amount claimed. Said facias was then issued and served upon the other defendants, and a trial by the court resulted in a finding and judgment against said two defendants. A writ of error was sued out to reverse said judgment and a brief and argument has been here filed by plaintiff in error, Marhoefer.

✓ In July and August, 1911, Thompson was engaged in the theatrical business at the Angelus Opera House in the City of Chicago. He was there doing business as the Thompson Opera Company. Stewart became associated with him in the business on or about August 1, 1911, at which time some preliminary steps were taken for the organization of a corporation to be known as the "W. A. Thompson Co., Inc." The organization of this corporation was never completed. On September 1, 1911, plaintiff in error, Marhoefer, was induced to take an interest in the business, and Thompson, Stewart and Marhoefer then entered into a written contract,

which provided, in part, as follows: That Thompson should be president of the Thompson Opera Company and should receive \$30 per week for managing its business, and that Stewart should be treasurer and receive \$20 per week; that Thompson had invested \$1,000 in the proposition and Stewart had invested \$1,500 therein; that upon the investment of \$1,500 by Marhofer, which should be a first lien on the property of said company, the debts of the enterprise could be paid up to date; that of the capital stock of said company of \$10,000, Thompson should receive \$3,000, and Stewart and Marhofer should each receive \$1,500, and \$4,000 should be and remain treasury stock, no part of which should be sold without the consent of the majority of the directors; that the three persons named should constitute the directors of said company. On September 13th, following, it was necessary to procure further funds to prosecute the business of said company, which funds were furnished by Stewart and Marhofer, who, with Thompson, then executed a contract, as follows:

"Chicago, Sept. 13, 1911.

"For and in consideration of seventeen hundred fifty dollars advanced by E. H. Marhofer and Dr. W. Stewart in addition to what was previously advanced that the said Marhofer and the said Stewart are to receive (\$3,000) two thousand dollars each of the capital stock of the Thompson Opera Co. and Col. Wm. Thompson to receive two thousand dollars in said Co. balance of stock to remain in treasury, said Col. Thompson to be paid a salary of one hundred dollars per week after the said Marhofer and the said Stewart have been repaid all moneys advanced.

W. A. Thompson,
Edward H. Marhofer,
W. T. Stewart."

On August 28, preceding, Thompson gave to defendant in error an order to print certain programs, slips, cuts, etc., for use in the business of the company, which order was filled and delivered by defendant in error on September 26th, and further orders for like work were filled and de-

livered by defendant in error on September 25th, 18th, 23rd and 30th. The total amount of the bill for said work was \$100.85, and upon the presentation of said bill by Thompson, he made an endorsement thereon, as follows: "O. K. OOL. W. A. Thompson Co. (Not Inc.) by W. A. Thompson, Mgr." This constituted the account stated which is sued upon.

No steps whatever appear to have been taken to comply with the provisions of the statute relative to the incorporation of the Thompson Grand Company, mentioned in the contracts bearing date, respectively, September 1, 1911, and September 18, 1911, both of which contracts were drafted by plaintiff in error, Harboefer.

That Thompson, Stewart and Harboefer were actually associated in the business of producing and presenting operatic and theatrical performances, does not admit of doubt. ✓

A company which is not a corporate body is a partnership, composed not merely of the directors, but of all the subscribers to the articles of association. Laverin v. McLaughlin, 161 Ill., 417; Quinn v. Ill. Trust & Savings Bank, 190 Ill., 428; Richardson Fueling Co. v. Harboefer, 235 Ill., 319. In the latter case, it is said:

"Independent of any liability under Section 15 of the Incorporation Act the appellants were liable as partners if the proof showed the delivery of the coal."

The fact that the first order for printing was given by Thompson to defendant in error prior to the time plaintiff in error, Harboefer, became interested in the enterprise is not of controlling significance.

"In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is

Founded, not upon the original contract, but upon the promise to pay the balance ascertained." Thompson v. Harboer, 4 Gils., 58; American Bank Co. v. Bernhardt & Co., 53 Ill. App., 446; Rish v. Zimmerman, 507 Ill., 420.

The claim of defendant in error became an account stated when Thompson, one of the partners, agreed that the items of the account were correct and impliedly promised to pay the same, and it is clearly established that such action by Thompson was subsequent to the time plaintiff in error, Harboer, became interested in the enterprise, and during the time said enterprise was being conducted by the three parties in interest.

The finding and judgment of the Municipal Court were right and the judgment is affirmed.

JUDGMENT AFFIRMED.

9 - 19392.

R. REISNER & CO.,
Defendant in Error,
vs.
THOMAS GORDON,
Plaintiff in Error.

TERMIN 20
MUNICIPAL COURT
OF CHICAGO.

1921A. 591

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

Roman Reisner brought suit in the Municipal Court against Thomas Gordon to recover an alleged balance of \$344.78, due to plaintiff for bread sold and delivered to defendant. A trial by the court resulted in a finding and judgment against the defendant for the balance claimed to be due to plaintiff, and the defendant prosecutes this writ of error to reverse said judgment.

There is no appearance in this court by defendant in error. The abstract of the record filed by plaintiff in error is so inadequate to a proper comprehension of the case, that the judgment might well be affirmed for the want of a sufficient abstract. After imposing upon ourselves the burden involved in reading the record we conclude that no substantial reason exists for setting aside the finding and judgment of the trial court.

✓ From 1893 to 1897 plaintiff in error conducted a grocery business in connection with which he made daily purchases of bread from defendant in error, who, either in person or by his servant, delivered the same to plaintiff in error at his place of business. The manner of keeping the account between the parties was somewhat crude. Plaintiff in error was provided with a book to which defendant in error and his servant had access, wherein was written, by the person making

the delivery, the amount of bread delivered and the price thereof, and also the payments made therefor by plaintiff in error upon account. The book was not produced at the trial and there is no satisfactory evidence tending to show what became of it. In the usual course of business the book was retained by plaintiff in error. That there was a balance due defendant in error when the parties ceased doing business in 1897 is conceded by plaintiff in error. Proof offered by defendant in error tends to show that the amount of said balance due him was \$360.03. Plaintiff in error is unable to state the amount of such balance. From June 12, 1906, to July 12, 1906, plaintiff in error made seven payments of \$10 each to apply upon the balance due defendant in error, and a further payment of \$45.30 was made by plaintiff in error as he testified, on July 18, 1906. Defendant in error testifies that said payment of \$45.30 was made on July 18, 1907. The date upon the receipt given for such payment appears to have been changed. It is conceded that the payment of \$45.30 was the last payment made by plaintiff in error and in view of the fact that two payments of \$10 each were made by him in May and July, 1906, we think the trial court was warranted in concluding that the payment of \$45.30 was made in 1907, as claimed by defendant in error.

It is claimed by plaintiff in error that at the time he made the payment of \$45.30, the amount of the balance due defendant in error was a matter of dispute between the parties, and that said payment was made and received as in full settlement of the claim which was then in dispute. The payment was made by a check of the Illinois Steel Company, which plaintiff in error had acquired from the original payee, and was the only available fund which plaintiff in error had on his person when demand for payment was made by defendant in error. ✓ The

receipt then given by defendant in error was upon account and not in full settlement, as is claimed by plaintiff in error, who offers no explanation why the receipt was not made to conform to the fact as claimed by him.

We perceive no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

418 - 30358.

JOHN F. DEVINE, Administrator of
the Estate of ANNA S. KEENAN,
Deceased,

vs.

JOSEPH C. FICKLIN et al.,

Appellee,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

1921 A. 593

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellants to recover damages for the death from typhoid fever of Anna Keenan, aged 14 years, alleged to have been caused by the negligence of appellants, wherein a trial in the Superior Court resulted in a verdict and judgment against appellants for \$400.

The cause was submitted to the jury upon the first, second, third and seventh counts of the declaration.

✓ The first count alleges that on August 17, 1910, and prior thereto, the appellants were the owners and agents of and were in possession and control of a lot improved with a two-story frame building known as number 6358 Aberdeen street, Chicago, Illinois; that appellee's intestate resided in one of the flats with her parents as one of the family, while other apartments were occupied by other tenants; that two lavatories or water-closets for the joint use of the tenants were on the ground adjoining the rear part of said building; that at or near to said building was a certain garden or vegetable patch in which were growing different kinds of vegetables jointly used by and supplying food and nourishment to said tenants; that the appellants negligently allowed the water-closets to become and remain in an unsanitary condition and allowed the pipes, drains and sewers to become and remain in an old, worn out and rotten and broken condition, thereby

causing sewerage and fecal matter to leak from said latrines in the ground and close to said vegetable patch, which leakage was liable to infect said vegetables with disease, was dangerous to the health and lives of persons eating said vegetables and inhabiting said apartments and constituted a nuisance there; that appellants had or should have had notice thereof; that said vegetable patch and ground became infected with a germ of infectious disease known as typhoid fever, and that appellee's intestate while exercising ordinary care for her own safety and welfare, ate of said vegetables and contracted said infectious disease, known as typhoid fever, which resulted in her death.

The second count is substantially like the first with the additional allegation that the conditions therein mentioned existed prior to the renting of said premises by the parents of the deceased, and were known to appellants and unknown to the deceased.

The third count charges a violation by appellants of the provisions of Section 1061, entitled "Leasing Unsanitary Buildings," and also Section 1065, entitled "Unsanitary Building - Nuisance," of Article VII of the Municipal Code, and the seventh count charges a violation by appellants of Section 1225 of said Municipal Code, entitled "Adequate Water-Closets - Cases"; and each of said third and seventh counts alleges that appellee's intestate contracted said disease of typhoid fever by eating said vegetables which were infected with the germs of said disease.

The evidence clearly establishes the following facts: That the plumbing in the water closets, provided by appellants for the use of the tenants in the building was permitted to become and to remain out of repair; that by reason thereof said water closets were in an unsanitary and filthy condition;

that fecal matter ever ran said closets into the basement of the tenements and upon the small tract of ground adjoining, in which vegetables were cultivated and grown; that the father of appellee's intestate, while living in the building, contracted typhoid fever and that he used one of said water-closets, while he was ill with said disease; that shortly thereafter appellee's intestate ate some of said vegetables, following which, she contracted said disease and died therefrom.

There is no direct proof tending to show that the vegetables which were grown in said tract of ground were infected with typhoid fever germs, neither is there any direct proof tending to show that appellee's intestate contracted typhoid fever from eating said vegetables. The evidence merely shows that fecal matter discharged by a typhoid fever patient usually contained the germs of said disease; that when such fecal matter in the ground comes in contact with growing vegetables, it is possible that any typhoid fever germs in said fecal matter may lodge upon and adhere to said vegetables; that a person eating vegetables which are thus infected with said germs may thereby contract typhoid fever. At least two presumptions, one based upon the other, must necessarily be indulged, to permit a recovery in this case. First, that the vegetables in question were infected with typhoid fever germs, and, second, that appellee's intestate contracted typhoid fever as a result of eating said vegetables.✓

It is a well established rule of substantive law that a presumption cannot be based upon a presumption. In other words, that "a presumption of fact is not alone a legitimate foundation for a second presumption of fact". Globe Ass. Ins. Co. v. Garisch, 183 Ill., 535; Green v. Mahonfeld,

214 Ill., 336; Kayser v. People, 134 Ill., 170; Ill. Steel Co. v. Bygoneski, 108 Ill. App., 231; City of Chicago v. Carlin, 141 Ill. App., 118; Strickland v. Grant Co., 17 Ill. App., 477.

The judgment is reversed with a finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED
WITH FINDING OF FACT.

FINDING OF FACT:

We find that the negligence alleged in the declaration was not the proximate cause of the death of appellee's intestate.

425 - 20365.

ANNA MAHER,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

1321A. 596

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

In this suit by appellee against appellant to recover damages for personal injuries, a trial in the Superior Court resulted in a verdict and judgment against appellant for \$5,500.

✓ The evidence for appellee tended to show that at about 11 o'clock on the night of March 24, 1911, she became a passenger upon one of appellant's northbound street cars, then being operated on Robey street, whereon appellant maintained double tracks up to a point a short distance south of Harrison street, at which point the double tracks converged into a single track which proceeded across Harrison street; that the convergence of the tracks at the point indicated necessitated a curve in the northbound track on Robey street, the radius of which curve was about 70 feet; that appellee and two women who accompanied her purposed leaving the car when it stopped at Harrison street to take a westbound car on said street; that the conductor called out Harrison street before the car had reached the point of convergence to the single track, and appellee thereupon left her seat and walked to the rear platform for the purpose of alighting from the car when it came to a stop; that the car was then running at a speed of from 10 to 12 miles an hour, and that it was running at that rate of speed when it took the switch on the curve at the said point of convergence; that as the car took the switch and went on to the curve at said rate of speed, it

gave such a sudden jolt or violent side motion that appellee was thrown thereby from the platform of the car upon the street pavement and injured.

While the evidence bearing upon the question of the negligence of appellant is closely conflicting, the verdict of the jury upon that issue was not unwarranted, and in view of appellant's avowal that it does not contend that the verdict upon that issue is clearly and manifestly against the weight of the evidence, we dismiss that question without further discussion.

The substantive grounds relied upon by appellant for a reversal of the judgment are, first, the refusal of the court to give to the jury the twenty-fifth instruction tendered by appellant; and, second, that the damages awarded by the jury are grossly excessive.

The refused instruction is as follows:

"You are instructed that while the law permits the plaintiff in the case to testify in her own behalf, nevertheless you have the right in weighing her evidence, to determine how much credence is to be given to it, and to take into consideration that she is the plaintiff and interested in the result of the suit."

It is conceded by appellee that this instruction is an accurate statement of the law, but appellee insists that the refusal of the instruction does not constitute prejudicial error, because the fifth instruction given at her instance sufficiently informed the jury upon that subject.

The fifth instruction given at the instance of appellee is as follows:

"You are further instructed that you are the sole judges of the credit to be given to the evidence of all witnesses; and in determining the weight you should attach to the testimony of any witness, you may take into consideration, the interest of such witness, if any, as shown by the evidence - his or her frankness and candor or lack of frankness and candor in testifying, his or her intelligence, or lack of intelligence, and the opportunity of such witness of knowing the matters and things about which he or she testified - and

from all such circumstances - as well as from the other facts and circumstances in evidence, you should determine the credit you should give to the testimony of each witness appearing upon either side of the case." ✓

The refusal by trial courts to give instructions similar to the 25th instruction here involved has been held sufficient ground for the reversal of judgments in cases where no other instruction of like import was given. Chicago R. R. Co. v. Mosch, 163 Ill., 305; East Chicago R. R. Co. v. Dougherty, 170 Ill., 379; C. & N. W. R. R. Co. v. Harrison, 211 Ill., 9.

In Chicago & N. W. Ry. Co. v. Smalley, 227 Ill. App., 349, and Maxwell v. C. & N. W. R. R. Co., 140 Ill. App., 188, the refusal to give said twenty-fifth instruction was held not to have been cured by the giving of said fifth instruction. In Boo v. Standard Oil Co., 124 Ill. App., 481, the giving of said fifth instruction was held to have cured the failure to give said twenty-fifth instruction. The slight variance in phraseology of said fifth instruction and of like instructions involved in the cases cited, which variance is urged by appellant as differentiating the instructions, is not of sufficient significance to merit consideration.

The interest of a witness, which, by the fifth instruction the jury were informed they might take into consideration in determining the weight they should attach to the testimony of such witness, must be held to refer to the interest of such witness in the result of the suit, and the mere fact that the instruction mentions other elements proper to be considered by the jury in determining the weight to be given to the testimony of the several witnesses, does not obscure the force and effect of the interest of the witness as an element proper to be considered. It must have been manifest to the jury that appellee as the plaintiff in the

suit, when she testified upon the trial, was a witness who had a direct interest in the result of the suit, and the jury must necessarily have considered and acted upon such reference in the instruction to the interest of a witness as peculiarly applicable to appellee. There is no evidence in the record tending to show that any person other than appellee who was called as a witness had any interest in the result of the suit. While the twenty-fifth instruction tendered by appellant might properly have been given to the jury, we are disposed to hold that the fifth instruction was sufficiently of like import with the twenty-fifth instruction to cure the failure to give the latter instruction.

Appellant's insistence that the damages awarded by the jury are excessive is unquestionably sustained by the record.

✓ Appellee at the time of her injury was 49 years of age. Considering the evidence most favorably for appellee, it tends to show that she was rendered unconscious by the fall for a very short period; that she was conveyed to the County Hospital on the night of her injury, and remained there until 10 o'clock the following morning, when she was taken to the University Hospital, where she remained about two weeks; that she sustained superficial bruises on her breast, on the left side of her head, on her left hip and her right knee; that she sustained a more severe bruise about and above her left eye which developed a slight scar above her eye; that her malar or cheek bone was slightly depressed, or possibly fractured, with some resulting injury to the facial nerves; that she developed some symptoms of neurasthenia, which her own physicians were unable to testify was referable to the injuries sustained by her; that she suffered considerable pain, and had had occasional attacks of headache; that her

sight is somewhat impaired, but whether such impairment of her sight was occasioned by her injuries is not disclosed by the evidence; that one of her teeth was broken and she had discharges of offensive matter from her nasal passages into her mouth; that she has "a numb feeling" on the left side of her face; that she was confined to her home for three months, during which time she was unable to do any housework; that up to the time of the trial she had been unable to do any washing or ironing.

After the accident and before the trial appellee sustained a severe mental and nervous shock following the sudden death of her husband, and the evidence tends to show that at least some of the symptoms of which she complained were occasioned by her sorrow and sense of bereavement in consequence of the death of her husband. ✓

While it does not appear that the jury were actuated by prejudice, passion or some improper motive in fixing the amount of damages at \$5,000, it is apparent from the evidence that the damages awarded are in excess of full compensation to appellee for the injuries sustained by her, and this is all that is requisite to influence the court to interfere with the verdict of the jury in that respect.

If within ten days from the filing of this opinion appellee will remit \$2,500 from the judgment, the judgment will be affirmed for \$3,000, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED IF REMITTITUR FILED
FOR \$2,500; OTHERWISE REVERSED AND
REMANDED.

14 - 19541.

FRED S. LOOMIS,
Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT

ELLSWORTH M. BOARD,
Plaintiff in Error.

OF MICHIGAN.

1921 A. 600

MR. PRESIDING JUSTICE DAUME
DELIVERED THE OPINION OF THE COURT.

In a suit brought by defendant in error against plaintiff in error to recover compensation for legal services, a trial in the Municipal Court resulted in a finding and judgment against plaintiff in error for \$300. The main contention of plaintiff in error is that the finding of the trial court was against the manifest weight of the evidence upon the issue whether or not the services rendered by defendant in error were as rendered at the instance and request of plaintiff in error.

✓ The evidence discloses that J. L. Board, a brother of plaintiff in error, was at one time the owner of a considerable number of shares of the capital stock of the American Can. Co., all of which he had in fact sold and transferred to other parties, but that certificates for 200 shares of said stock had never been transferred upon the books of the company, and, therefore, still appeared on said books as belonging to him; that continuing to receive notices from said company relative to its affairs, said Board concluded that he had not sold all of the shares of stock formerly owned by him, and that he was still the owner of 200 shares, the certificates for which were either lost or destroyed by fire; that acting, presumably in good faith on that belief, he entered into some arrangement with his former wife, Mrs. Board, whereby she claimed to have acquired some interest, the precise nature

of which is not disclosed, in said shares of stock, and said Board also assigned said shares of stock to plaintiff in error as security for a loan of \$400; that one Garrison, who resided at the home of Mrs. Hovie, was informed by her of her interest in said shares of stock, and that the certificates for said shares had been destroyed by fire, and she then consulted him with reference to the propriety of taking some steps to procure the issuance by the corporation of other certificates in lieu of those supposed to have been destroyed by fire; that she then proposed to Garrison that she would give him \$300, if he could procure such other certificates to be issued, and could effect a sale of the sugar; that after some correspondence with the officers of the corporation, and before he was informed that plaintiff in error held an assignment of the shares of stock, Garrison interviewed defendant in error relative to the subject, and sought the advice of defendant in error regarding the proper procedure to be adopted in procuring the issuance of new certificates; that shortly thereafter, when Garrison and defendant in error ascertained that plaintiff in error held an assignment of the shares of stock, the latter was called into conference and the whole situation was thoroughly discussed; that defendant in error, after an examination of the authorities bearing upon the question, advised plaintiff in error that a proceeding in equity might properly be instituted in Cook County to compel the corporation to issue to plaintiff in error new certificates of stock; that defendant in error was not then advised that the assignment to plaintiff in error was held merely as collateral security for a loan to his brother, but assumed that plaintiff in error was the actual owner of the shares of stock; that thereafter, with the authority and approval of plaintiff in error, defendant in error prepared

and filed in the Superior Court a bill in equity, wherein plaintiff in error was made complainant and the American Can. Co. and J. L. Board were made defendants, to compel the issuance of certificates for said ²⁰⁰ shares of stock to plaintiff in error; that plaintiff in error then paid to defendant in error \$50 to cover the preliminary costs of the proceeding; that thereafter defendant in error entered into negotiations with the attorney of record for the American Can. Co., which negotiations culminated in the adoption of a plan which was satisfactory to plaintiff in error and the American Can Co., and which involved the filing by defendant in error for plaintiff in error of a petition in the Circuit Court of Hudson County, New Jersey, under the laws of which state the corporation was organized, to effect the same purpose sought to be effected by the bill in equity filed in the Superior Court of Cook County; that during the pendency of these proceedings frequent conferences were had between defendant in error and plaintiff in error, in which plaintiff in error was fully informed regarding the various steps taken, and wherein he participated; that during the pendency of said proceeding in New Jersey, and before any final order or decree was entered, the true owners and holders of the two certificates of stock, each for 100 shares of the capital stock of the American Can. Co., to whom J. L. Board had sold and assigned said certificates, applied to said corporation to have said certificates properly transferred to them upon the books of said corporation; that upon the disclosure to the parties of the true facts, the proceedings heretofore mentioned necessarily finally terminated unsuccessfully.

There is evidence tending to show that some time prior to the transactions here involved J. L. Board had been adjudged a bankrupt, and that the decision to institute the

proceedings in the name of plaintiff in error was influenced in part by that fact. It is, however, apparent from the evidence that when it was ascertained that plaintiff in error held an assignment of the shares of stock from his brother, it was recognized by all concerned, that the proceedings should properly be instituted in the name of plaintiff in error. The conduct of plaintiff in error in advising with defendant in error with reference to every step that was taken in the proceedings, and in advancing the money necessary to pay the preliminary costs, is inconsistent with the position now assumed by plaintiff in error that he was merely acting for other parties and not on his own behalf, when he availed himself of the services of defendant in error. There is some evidence tending to show that in the event of the favorable outcome of the proceedings instituted by plaintiff in error it was understood that the rights and interests of the other parties in the shares of stock would be adjusted with them by plaintiff in error.

Defendant in error testified that in one of the interviews regarding the method of procedure to be adopted plaintiff in error proposed that defendant in error take the suit upon a contingent fee and that he, defendant in error, refused to do so. Plaintiff in error denies that he made any such proposition to defendant in error with reference to the latter's fees, but admits that something was said by witnesses with reference to the propriety of defendant in error contingently advancing the amount necessary to cover the expense of a trip to New York and New Jersey.

Upon a careful consideration of all the evidence bearing upon the conduct of the parties relative to the transactions involved we are unable to say that the finding of the trial court was unwarranted.

Evidence of conversations between plaintiff in error and Harrison out of the presence and hearing of defendant in error was incompetent and was properly excluded.

The judgment of the Municipal Court is affirmed.

Judgment Affirmed.

170 - 20094.

M. A. RIMAN,
Defendant in Error,
vs.
DAVID H. BARKAL,
Plaintiff in Error.

FAVOR TO
MUNICIPAL COURT
OF CHICAGO.

1931 A. 603

MR. PATRICK JUSTICE HAUME
DELIVERED THE OPINION OF THE COURT.

In a suit instituted in the Municipal Court by defendant in error against plaintiff in error to recover \$200 as commission for services in effecting the exchange of certain real estate ^{between} plaintiff in error and one, Goldstein, a trial by the court resulted in a finding and judgment against plaintiff in error for the amount claimed. There is no appearance in this court by defendant in error.

✓ It was conceded upon the trial in the court below that defendant in error at the time of the transaction here involved had not procured a license to engage in the business or act in the capacity of a broker, within the city of Chicago, as provided in paragraph 192, Chapter IV of the Municipal Code.

As grounds for the reversal of said judgment, it is urged; first, that the evidence shows that defendant in error was engaged in the business of a real estate broker when he consummated the transaction in question, and, second, that the evidence shows that defendant in error without the knowledge and consent of plaintiff in error acted as the agent of both parties in said transaction.

In Ross v. Mac Farland, First Nat. Bank Co., Cas. No. 18304, opinion filed February 3, 1913, it was held that paragraph 192, above referred to, of the Municipal Code, applied only to persons engaged in the business of brokerage as an occupation or vocation, and not to those who may have performed such service

is an isolated instance.

It was admitted by defendant in error that he had acted in the capacity of a real estate broker in connection with the firm of S. L. Rose & Co. until March, 1913. The transaction here involved was not consummated by the execution of a written contract between the parties until July 20, 1913, but defendant in error testified that he was first consulted by plaintiff in error with reference to the disposition of his property in March, 1913. Witnesses called by plaintiff in error testified that during the time following March, 1913, and while defendant in error was negotiating for the sale or exchange of the property of plaintiff in error, he represented himself as being engaged in the real estate business, and that he then had and distributed his business cards wherein he designated his business as "Real Estate, Loans and Insurance"; that defendant in error sought to effect an exchange of the property of plaintiff in error for other properties located on Taylor street and Ogden avenue. Defendant in error denied that he had been engaged in the business of a real estate broker since March, 1913, or that he had represented himself as a real estate agent or that he had any business cards wherein he designated himself as a real estate agent, but he did not deny that he had sought to effect an exchange of the property owned by plaintiff in error for property other than that owned by Goldstein. ✓

Upon the issue as to whether or not defendant in error was engaged in the business of a real estate broker, the finding of the trial court is against the manifest weight of the evidence and can not be sustained. We are fully persuaded from the evidence that defendant in error was in fact engaged in said business at the time of the transaction in question, and that said transaction was not merely an

isolated act on his part. Defendant in error, not having procured a license as required by paragraph 293 of the Municipal Code, it follows that he was not entitled to receive or recover a commission for his services in effecting an exchange of the properties involved in the transaction in question.

In view of the conclusion arrived at with reference to the first ground urged for a reversal of the judgment, it is not necessary to consider and determine the other question raised by plaintiff in error.

The judgment of the Municipal Court is reversed with a finding of facts to be incorporated in the judgment in this court.

JUDGMENT REVERSED WITH FINDING OF FACT.

FINDING OF FACT:

We find that at the time defendant in error effected an exchange of the properties between plaintiff in error and one, Goldstein, for which service he seeks to recover a commission in this suit, he was engaged in the business of a real estate broker in the City of Chicago, and that he had not then obtained a license from the Municipal authorities of said city, authorizing him to engage in said business, as is required by paragraph 293, Chapter XV, of the Municipal Code of the City of Chicago; that said paragraph of said Municipal Code provides as follows: "It shall be unlawful for any person or corporation to engage in the business, or act in the capacity of a broker, within the City, without first obtaining a license therefor. Application for such license shall be made in writing to the Mayor, and upon payment to the City Collector of the sum of \$25.00, a license shall be issued to the applicant by the City Clerk. Such application shall state the name of the person or corporation, and the location of the place or places of business for which said license is desired."

H. W. SIFSON, doing business as
H. W. SIFSON & CO.,
Plaintiff in Error,

vs.

I. V. WHITING, Administrator of
Estate of CHARLES WHITING, De-
ceased,
Defendant in Error.

Error to
Municipal Court
of Chicago.

1921 A. 605

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The claim of plaintiff below (plaintiff in error here) was for commissions as a real estate broker in bringing about an exchange of properties between Charles Whiting, deceased, and one Hecht, and was presented upon the theory of either an express or implied contract. The case was heard by the court without a jury, and the court held that there was no evidence offered or received tending to show plaintiff's right to recover. There was no proof of an express agreement and we agree with the conclusion of the trial judge that the evidence does not justify the inference of either an express or implied agreement.

✓ Whiting having died during the pendency of the suit, the court was deprived of the benefit of either his or Sifson's versions of any personal interviews or arrangements they may have had in connection with the deal on which the latter claims commissions.

Plaintiff's proof consisted of (1) correspondence between the parties relative to a previous transaction had prior to the negotiations in question, (2) proof as to the time when Whiting and Hecht listed their respective properties with plaintiff, and (3) the testimony of Hecht as to certain conversations with Whiting in the nature of admissions.

By such correspondence plaintiff sought to show that Whiting paid him a commission on the previous transaction and knew of Sisson's custom to charge commissions to both parties in such a transaction. Defendant in error urges that such correspondence was not only irrelevant, but that it showed that Whiting disputed Sisson's right to a commission on said previous transaction and that he never paid him one. He also urges that whatever it may show as to Sisson's custom to charge double commissions in such transactions, it does not establish proof of a custom known to him. We are disposed to agree with defendant in error in both of these contentions, and think such correspondence should be disregarded in determining whether or not there was proof of any agreement between the parties as to the transaction in question.

As to evidence relating to the listing, so-called, of the properties of Whiting and Hecht with plaintiff, the testimony is very indefinite. If we are to understand by the term "listing" the placing of the property with Sisson as an agent, we, nevertheless, have no direct evidence as to the terms upon or the purpose for which Whiting's property was listed. Russell, Sisson's employee, said he noted Whiting's property on a card about December 20, 1909. Hecht said he listed his property for exchange with Sisson about February 1, 1910. But a letter in evidence from Whiting to Sisson, dated December 9, 1909, clearly indicates that the exchange of said properties was the subject of consideration before that time. The letter purports to be a reply to a letter from Sisson relating to such properties and, being received during the negotiations on which plaintiff claims commissions, was relevant to the issues. But neither said letter nor any other evidence indicates what were the precise relations between the parties to the transaction in question, either before or subsequent to that time, whether Sisson was acting as agent for Hecht or for Whiting, or as a broker merely to bring them together. The letter is consistent with any one of these relations. While Russell testified that

he listed Whiting's property, he stated that he did so on information obtained from Sisson, and that he heard no conversation between the latter and Whiting. The testimony, therefore, with regard to the listing of the property has little, if any, probative value, and there is no other evidence that discloses what were the contractual relations between Whiting and Sisson.

The only other relevant evidence bearing on the subject was the conversation with Whiting testified to by Hecht. He testified that in the course of negotiations Whiting offered him three houses and that when Hecht said he wanted four, Whiting replied, "I am going to turn the other one over to Mr. Sisson or his commission," and that Sisson then laughed and said he did not want real estate but would have to have cash for his commission; and that when the deal was closed, Whiting said to him, "I will have to pay 5% commission on my end of this deal." But we do not regard these expressions, standing alone, sufficient to establish an agreement between the parties to pay commissions. But if it were otherwise, inasmuch as Hecht paid Sisson commissions on the deal, it does not follow, without other competent proof as to their relations, that Sisson had the right to collect commissions from both parties, or that Whiting so understood. In the absence of affirmative evidence from which the nature of the relations of the parties may be properly inferred, which cannot be supplied by presumption, it cannot be assumed that they were such as to warrant collecting commissions from both parties, which could ^{not} be done without Whiting's consent if Sisson was called upon to exercise any judgment or discretion in the transaction.

While, as urged by plaintiff in error, a broker may collect commissions from both parties to a real estate transaction, where he is not called upon to exercise his judgment or discretion and is employed merely to find a purchaser upon terms fixed by his employer and to bring the parties together on such terms, yet, in

the absence of proof in the record to disclose the nature of the agreement or character of the relation between Sisson and Whiting, there is no room for the application of such principle.

Disregarding, as we must, the correspondence relating to the previous transaction, as having no legitimate tendency to establish what was the agreement or understanding between the parties, and disregarding also the entire correspondence subsequent to the negotiations in question, as plaintiff in error contends must be done, we find nothing left in the record from which it may be definitely determined what was the nature of the agreement between the parties to this transaction or from which a contract to pay commissions will be implied.

In view of what we have already said, it is unnecessary to consider plaintiff's objections to the correspondence referred to subsequent to negotiations between the parties to the deal. Had they been sustained, the same conclusion would follow. We think the judgment should be affirmed.

AFFIRMED.

NUNZIO RUSSO,

vs.

IGNATIA RUSSO.

IGNATIA RUSSO,

vs.

NUNZIO RUSSO.

Appellee.

Appellant.

Bill.

Appeal from
Circuit Court,
Cook County.

Cross-bill.

192 I.A. 308

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The question presented on this appeal is whether the evidence supports a decree for separate maintenance heard on appellee's cross-bill.

The original bill was dismissed on complainant's own motion. It was filed July 10, 1911, and charged desertion for two years. The cross-bill was filed July 25, 1911, and charged desertion on July 6th, adulterous practices, and, as a result thereof, communication to her of a venereal disease.

When the hearing closed (May 22, 1913) the chancellor made an oral statement of his conclusions to the effect that neither the charge of adultery nor the communication or existence of such disease ^{was} established, but added, "at the same time, I think he is blamable for unceremoniously leaving her and having nothing more to do with her. Under the circumstances she had nothing to do but go home to father and mother; and she did it, so that I think that she is living apart from her husband without her fault, and, therefore, there is nothing to do but for the court to make an allowance to her for her support and care." At the conclusion of the court's remarks, a discussion having arisen as to an immediate provision for the wife, and, the parties having evinced a disposition to make an amicable arrangement therefor, the court remarked, "I will not enter

any decree at the present time. I will let the case stand as it is." The decree in question was entered July 2, 1914. The record does not disclose what, if anything, was done in the meantime, but there is nothing to indicate abandonment of the proceedings or loss of jurisdiction.

Whatever view the court may have taken as to the sufficiency of the evidence relating to adultery, yet, leaving that out of consideration, there was other evidence to support the court's conclusion that the separation was brought about by unjustifiable conduct of the husband and without fault of the wife, hence the decree is well founded even though it does not contain findings of the specific facts upon which the conclusion as to such ultimate facts is based, the evidence of such specific facts having been duly preserved in the certificate of evidence. We shall, therefore, allude only to the other evidence referred to, showing that the separation existing at the time of filing the cross-bill was occasioned through the husband's and not the wife's fault.

The parties lived with the husband's parents from the time of their marriage in June, 1906, until the latter part of May, 1909, when she went to her parents in Iowa for a visit and partly on account of an illness for which she had been receiving radical treatment. Both parties testified that they had no domestic differences prior to that time. She continued to receive treatment in Iowa, and wrote to her husband about it and asked for money to pay doctor's bills and current expenses. In her letters written shortly after arrival in Iowa, she refers to her returning to Chicago and requests her husband to get rooms for housekeeping, saying in one of them, "I do not care how cheap it is. Anything that you can put up with, I can, just so we can be alone." The letters clearly indicate a desire that they should live together and elsewhere than with his parents. On August 6, 1909, he advised her by letter that he did not want anything more to do with her, saying, "I mean by

this that from today on I will take legal steps to free myself from you. You may be so advised as to regulate yourself." She appears to have answered the letter immediately, and, in a letter of August 30, 1909, wrote: "I do not understand why you do not write to me," and again requests him to look for rooms, saying, "I am willing to go anywhere that we can live by ourselves so as not to have any future troubles or difficulties, and when we are away from both your and my people there can be no trouble arising . . . we will be the ones to either enjoy or suffer the results and not anybody else." These letters fairly represent her attitude toward him up to their final separation. But in a brief reply, September 1st, he again tells her, "I will not have anything more to do with you." There is nothing in the record that seems to warrant any such attitude on his part.

The following month she came to Chicago and filed a bill for separate maintenance and an accounting which was dismissed upon stipulation of the parties after a reconciliation between them May 31, 1911, from which time they lived and cohabited together in a small flat, secured by him on Halsted street, until July 6, 1911, when they finally separated. Complainant's father testified that when the reconciliation took place, his son agreed to furnish the house on Halsted street and live with his wife. His financial circumstances do not appear to have subsequently changed.

The evidence on neither side pertaining to events immediately preceding separation is as explicit or full as it might have been. She testified, however, that when her husband came home evenings to the flat he did not speak to her, and after supper went out and did not return until late in the evening; that he never asked her to go out; that he said he went to his parents but would not take her along, giving no reason therefor; that when he finally left her it was without notice of his intentions; that he left her saying he was going to Detroit; that she waited for days to hear

from him, and got her first communication in a notice that he had brought a divorce suit; that she waited at the flat for a week or two until her mother came for her. His testimony was to the effect that he went back to his father's house because he could not afford to keep up the flat and that she would not go back there. In justification of that position, he said that the rent was \$30 a month, that he gave her \$6 a week, paid the grocery bills (how much does not appear), and was getting \$18 a week salary. But he gave no other details as to his inability to support her and no other explanation for leaving her. He admitted that he went to Estreot when he left her, on business as he claimed, and that when he returned, he did not go to the flat but communicated with her only by telephone.

His testimony as to the real ground for leaving her is meager and not convincing, especially in the light of his previous conduct. His explanation of the facts pertaining to the separation and the manner of it, taken into consideration with his subsequent attitude, was not such as to induce belief that he gave the true reason for leaving her. Apparently without suggestion of a separation or divorce or even discussion over the subject of their leaving the flat, he left her without notice of his intention and a few days later filed a bill for divorce charging her with desertion for two years, in spite of their reconciliation and subsequent living together, and falsely charged that such desertion took place May 23, 1909, for he himself testified that she went away at that time for her usual vacation with her parents, that there was no quarrel between them and that he expected her to return in due season. Besides it appears that she wrote him almost immediately after her departure to Iowa requesting him to get ready so they could live alone, and that it was he and not she, as shown by his two letters aforesaid, that evinces a purpose to sever their relations.

The injustice of instituting a suit for divorce on false charges, and the circumstances under which and in which he left her, are not compatible with blameless conduct on his part; and in our opinion, such injustice is aggravated by his seemingly unfounded answer to the cross-bill, charging, without specifications or attempt to prove, that she wilfully and frequently disregarded her marriage vows and obligations. These matters were not calculated to invite credence in his explanation for leaving his wife, or acceptance of his version thereof instead of hers. We think there was sufficient evidence to show that the separation was without her fault and in consequence of his.

AFFIRMED.

TOM KILOVAS,
Defendant in Error,
vs.
NICK KILOVAS,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1921 A. 609

MR. PRESIDING JUSTICE SPENCE DELIVERED THE OPINION OF THE COURT.

TOM Kilo vas brought suit against Nick Kilo vas for a balance of \$142 claimed to be due as wages and as authorized upon an accounting between them October 13, 1911. Defendant admitted an accounting was had, but claimed it was on November 30, 1911, and that another was had at a still later date. His book of account was received in evidence to show that the account as it stood November 30th, was assented to by plaintiff's putting his signature thereto, when it showed a balance in plaintiff's favor of \$46.73. Afterwards there was charged to plaintiff \$187.70, representing some unpaid accounts made in the course of his employment for which he seems to have been responsible, and for which he admitted his liability, and which, with other credits and debits unquestioned, changed the account to a balance against him of \$142.31.

The only question raised on the record is whether or not the finding and judgment of the court were against the manifest weight of the evidence.

We think the issues as framed were such as to require the court to determine from the evidence heard on which side of the account the balance lay, and that it could not be determined without adequate proof of whether said accounts, aggregating \$187.70, had been collected by or for the defendant; and inasmuch as plaintiff admitted his liability therefor, the burden of proving their collection or payment fell on him. He offered no proof on the subject beyond his mere assertion that they had been collected. By

State of ...

Action by ...
Kilovan to receive ...
Here copy of ... as indicated

when or when and whether paid over to defendant, he did not state. Defendant denied they had been collected. The parties owing them did not testify, nor anyone else, in relation thereto.

In that state of the record, it would be impossible to say what were the facts, and, if there were not other evidence to be had on the subject, we would feel compelled to discuss more fully whether the judgment was not against the manifest weight of the evidence, and in that connection to consider another disputed item of \$300, which plaintiff contended was paid in cash and should have been credited to him on the book, and which defendant claimed had not been paid. It exists only on the debit side of said account immediately over plaintiff's signature, but he contended, without very much positiveness, that it was not on the book when he placed his signature there. But, whatever may be the fact with regard to said item, no balance can be struck with any degree of justice or exactness without more adequate proof as to whether the sum of \$187.70 in dispute was collected. There was a manifest opportunity for more evidence on that subject and for that reason we think there should be no final judgment without another opportunity for furnishing it; hence, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

192/611
MAY 25 1915.

21485

KNIGHT LIGHT COMPANY,
Appellee,

vs.

JESSE K. FARLEY and FARLEY CANDY
COMPANY, a corporation,
Appellants.

}
} Appeal from
} Superior Court,
} Cook County.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order restraining and enjoining appellant Farley, the lessor of certain premises, from in anyway interfering with appellee's possession and use thereof, and interfering with the furnishing of water, heat and electric light and power thereto.

The order overrules general and special demurrers by both appellees to the original bill, and purports to rest on both the original and an amended bill, and is directed against Farley and his agents.

Appellee makes the point that as the order does not specifically mention the Farley Candy Company, a joint appeal was improper. The theory of both bills is that while there was no provision in the lease for furnishing appellee with electricity for motor power, and the agreement therefor was with said company, the latter was under the direction and control of said Farley, and, in fact, was merely his agent in the matter. Not only, therefore, is the company affected by the order, and, being a party to the record, entitled, whether specifically mentioned in the order or not, to be before us on appeal (West Side Hospital v. Steele, 124 Ill. App. 534), but under the averments supporting the theory of agency, it comes within the scope of the order, directed, as it is, against Farley's agents.

While the order purports to rest on both the original

and amended bill, it must stand, if at all, on the latter as it superseded the former.

Appellee's contention is that conversations had between Farley and Knight, president of appellee, in July, September and November, 1914, and January 15, 1915, show an agreement to extend the lease from January 31, 1915, the date of its expiration, to August 1, 1915.

The material averments in the amended bill are that in the July conference Farley said appellee might remain in the leased premises until August, 1915, and until needed for his use, and that they agreed that the exact date need not be definitely determined at that time "but if either of said parties changed his plans he would notify the other thereof"; that in the September conference Knight consulted Farley as to the exact time when appellant would need and appellee should vacate the premises, and, thereupon, Farley said he would not need them until August, 1915, and might not for another year, "whereupon Knight stated that the complainant would not vacate said premises before August, 1915," and Farley stated that he might be glad to have complainant remain until August, 1916; that in the November conversation Farley informed Knight "that there were no new developments in the matter and that the previous arrangement * * * still remained the same." It is further alleged that on January 15, 1915, Knight informed Farley that complainant must know definitely the date "after August 1, 1915," when he would expect complainant to vacate said premises, and that Farley said he would take the matter up with his sons and let him know what decision they came to. (The words "after August 1, 1915," do not appear in the original bill.) It is further alleged that later in January, Farley notified Knight that he wished complainant to vacate the premises on May 1st following, and on February 8th served complainant with notice demanding immediate possession.

The bill was filed March 2nd and the injunction order entered March 11th.

We think the amended bill is plainly vulnerable to appellant's criticisms. If the July conversation constituted a parol agreement for a lease to August 1, 1915,- one not to be performed within one year from the making thereof, it was obnoxious to our statute of frauds, and at best showed a mere tentative arrangement expressly subject to a change of plan by either party. The September conversation negatived the idea that any definite agreement had been entered into prior thereto, and lacks the material elements of a binding agreement. The November conversation showed no change in the situation and tended to show no definite agreement had been reached, and this construction is unquestionably confirmed by the later conversation of January 15th, especially if the words, "after August 1, 1915," be omitted, as they were in the version of that conversation given in the original bill. They manifestly were intended to hark back to the September conversation and to raise the implication that an extension to August, 1915, had been definitely agreed upon, and that the only undecided matter was an extension of the period beyond that time. But, if the previous conversations lacked the material elements of a valid agreement, they are not aided by this self-serving declaration, which evidently did not embody Farley's understanding, for, within a few days, he served notice that he would want the premises on May 1st.

A suit to enjoin the breach of a contract seeks a negative
/ specific enforcement of that contract (Pomeroy's Equity Jurisprudence, Sec. 1341), and in this state is governed by the same rules as a suit to enforce a specific performance. (Ulrey v. Keith, 237 Ill. 284.) Testing the alleged agreement by said rules, a court of equity will not enforce it, lacking as it is in certainty and mutuality. Presumably complainant stated the conversations relied upon as favorably as possible to its contention. A reading of them, however, impresses one not only that no definite arrangements were

concluded, but that whatever they were, either party might terminate them any time after the expiration of the written lease. The cases are numerous,- many of them being reviewed in the Ulrey case, supra, - where under such conditions courts of equity will refuse to enforce the agreement or enjoin a breach of it. The July agreement, so-called, was expressly subject to change of plans by either party, and if we take the version of the January conversation, as stated in the original bill, the same uncertain conditions existed at that time. However, construing together the September and January conversations in their most favorable light to appellee, they lack certainty and mutuality and fail to express an agreement that either party could enforce against the other. Farley's statement that "he would not need said premises until August, 1915," was not an agreement to extend the lease to that time, nor was Knight's statement that the "complainant would not vacate said premises before August 1, 1915," an agreement to remain therein on specific terms. These statements were not sufficiently explicit to constitute a submission of definite terms by one party and acceptance of them by the other. They contain no actual or mutual promises, state no terms, do not explicitly or impliedly adopt the terms of the written lease, and do not express a definite or complete contract in any respect. If a contract is incomplete, uncertain or indefinite in its material terms it will not be specifically enforced in equity. (Pomeroy's Equity Jurisprudence, Vol. 6, Sec. 764:)

There being no agreement shown for right to possession by appellee after the expiration of the written lease which can be enforced in a court of equity, it is needless to consider the averments in the bills relating to any inconvenience appellee might suffer from its understanding that there was such an agreement, nor is there room for application of the doctrine of estoppel invoked by appellees. Either there was an agreement or not, and neither bill sets up one that is enforceable in a court of equity.

REVERSED.

JOHN F. DEVINE, as administrator
of the estate of Orrin F. Place,
deceased,

Defendant in Error,

vs.

ANNA B. GILMORE,

Plaintiff in Error.

Error to
Circuit Court,
Cook County.

10 A. 625

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 26, 1911, plaintiff commenced an action in replevin in the Circuit Court of Cook County against Anna B. Gilmore, defendant. He alleges in the affidavit that he was entitled to the possession of six certificates of stock (describing them) in the Saratoga Gold Mining Company, a corporation, that the same were of the value of \$11,000, and that the defendant wrongfully took and wrongfully detains said certificates from him. He filed a declaration containing counts both in replevin and trover. The writ was returned by the sheriff on August 21, 1911, showing that the defendant had been personally served on July 27, 1911, but that upon demand the defendant had refused to turn over said property. The cause was put at issue and came on for trial before a jury in June, 1912. During the trial said certificates of stock were produced by the defendant to be used as evidence, and the same were admitted in evidence, and the court verbally ordered that the same be impounded in the hands of the clerk of the court for safe keeping, and as evidence, and that they be retained by said clerk until the further order of the court. On June 27, 1912, the jury returned their verdict in which they found the defendant guilty and that the right to the possession of the property was in plaintiff, and assessed plaintiff's damages at the sum of one cent.

On July 13, 1913, which was the last day of the June term, 1913, of said court, the defendant's motion for a new trial was denied and the court entered judgment "that the plaintiff do have and retain the property replevied herein by virtue of the writ of replevin issued in said cause and do have and recover of and from the defendant his damages of one cent in fore as aforesaid by the jury assessed together with his costs and charges in this behalf expended and have execution therefor."

An appeal from the judgment was at once prayed by said defendant to this court and allowed upon her filing her appeal bond in the sum of \$5,000 within 30 days, but the appeal was not perfected.

On July 26, 1913, after the term at which said judgment was entered had passed, the court caused the following order to be entered of record in said cause:

"It is hereby ordered that the certificates of stock in the Saratoga Gold Mining Company of Arizona issued to Orrin F. Place, as follows: " (here follows a description of said certificates) "introduced as evidence in the above cause be and they are hereby impounded in the hands of the clerk of this court for safe keeping and as evidence and be retained by said clerk until the further order of this court. It is further ordered that this order, the same having been verbally made in said cause on the 13th day of July, 1913, be now entered nunc pro tunc as of said 13th day of July, 1913."

Early in February, 1914, more than 18 months after said judgment of July 13, 1913, was entered, plaintiff moved the court for an order of the court directing said clerk of the court to turn over said certificates to plaintiff's attorneys. The probable reason for plaintiff's seeming delay in attempting to get the actual possession of said certificates of stock, which had been impounded with said clerk as aforesaid, is explained by the facts contained in the record of the case of Gilmore v. Bidwell, clerk, etc., in which case, No. 20294, an opinion was filed by this court on January 25, 1915. It appears that on July 23, 1913, after the judgment in the present case had been entered in said

Circuit Court, and one day before said nunc pro tunc order was entered, said Anna B. Gilmore commenced an action in replevin in the Superior Court of Cook County against said clerk of the Circuit Court to recover the possession of said certificates of stock, that said clerk refused to turn the same over to the sheriff under the writ, and that thereafter certain proceedings were had which resulted in said Superior Court entering a judgment in said replevin action, on January 22, 1914, in favor of said clerk of said Circuit Court. Anna B. Gilmore appealed to this court from said judgment of the Superior Court and on January 25, 1914, that judgment was affirmed.

In the present case, after plaintiff had moved the Circuit Court for an order directing said clerk to turn over said certificates of stock to plaintiff's attorneys, Anna B. Gilmore, defendant herein, on February 4, 1914, filed certain written objections to the allowance of said motion, "expressly limiting her appearance for the sole and only purpose of objecting to the consideration by the court" of said motion, and setting forth various grounds of objection which were to the effect (1) that the court was without jurisdiction to enter any such order; (2) that the court never had jurisdiction to enter any order impounding said certificates of stock; (3) that the final judgment in said replevin action was entered by the court on July 13, 1913, which was the last day of the June term of said court, that the nunc pro tunc order of July 26, 1913, was entered after the term had passed, that there was no record or memorandum of the court from which the court was justified in entering of record said impounding order nunc pro tunc, and that therefore the court was without jurisdiction to enter such order and that the same was void; and (4) that plaintiff, by electing after the return of the replevin writ to proceed in trover against defendant and so proceeding to a final judgment, thereby elected to abandon his claim of title and right to the possession of said certificates of stock and to vest the

title thereto in the defendant. On February 7, 1914, after a hearing upon the motion, the court entered an order wherein it was set forth that it appeared to the court that said verdict of June 27, 1913, was rendered, that said final judgment of July 13, 1913, was entered, that said judgment has remained in full force and unaltered, and that no appeal or writ of error has been prosecuted therefrom, and wherein it was ordered that said certificates of stock, "which have heretofore under order of court been impounded in the hands of the clerk of this court, be forthwith turned over and delivered by said clerk to Beach & Beach, attorneys for the plaintiff." Defendant excepted to the entry of the order and prayed an appeal therefrom which appeal was denied, but the defendant was given time within which to file a bill of exceptions, which she did. The bill of exceptions merely discloses that after argument, etc., the court entered said order of February 7, 1914, to which defendant excepted, but it does not disclose that any attempt was made by defendant on the hearing to show that the court was not justified in entering said order of July 26, 1913, nunc pro tunc as of July 13, 1913.]

On September 13, 1914, defendant sued out this writ of error, not from the judgment of the Circuit Court of July 13, 1913, but from said order of February 7, 1914, which directed said clerk to turn over said certificates of stock to the plaintiff's attorneys. Twelve assignments of error are here made, but in none of them is it assigned as error that the court erred in entering said replevin judgment of July 13, 1913. The assignments of error are to the effect that the court erred in entering any order impounding said certificates of stock with the clerk, in entering said nunc pro tunc order of July 26, 1913, and in entering said order of February 7, 1914, directing the said clerk of the court to deliver said certificates to the attorneys for plaintiff.

We are of the opinion that, as the certificates of stock

were introduced upon the trial of the replevin action, the court had the right and power to impose them for safe keeping with the clerk of the court until the further order of the court and pending the verdict and judgment in that action. And we cannot say, in the absence of any affirmative showing to the contrary in the bill of exceptions, that the court was not justified in entering said quid pro tunc order of July 13, 1912, to make the records of the court speak the truth. And we are further of the opinion that the court was fully warranted in entering said order of February 7, 1914, for the purpose of rendering effectual the judgment of the court, rendered on July 13, 1912, upon the verdict of the jury. No error being here assigned to the effect that the court erred in entering said judgment of July 13, 1912, the question whether that judgment is erroneous is not before us. Furthermore, "a proceeding to enforce a judgment is collateral to the judgment, and therefore no inquiry into its regularity or validity can be permitted in such a proceeding." (23 Cyc. 1084.)

The order of the Circuit Court of Cook County, entered February 7, 1914, is affirmed.

AFFIRMED.

CONTINENTAL and COMMERCIAL TRUST
and SAVINGS BANK, as administrator
of the estate of WILLIAM J. NEW-
BURN, deceased,

Appellee,

vs.

ILLINOIS TERRA COTTA LUMBER COM-
PANY, a corporation,

Appellant.

Appeal from
Superior Court,
Cook County.

1921 A. 629

STATEMENT OF THE CASE. ✓ This is an appeal from a judg-
ment for \$1,500 recovered by plaintiff, as administrator, in the
Superior Court of Cook County against the Illinois Terra Cotta
Lumber Company, a corporation (hereinafter called Terra Cotta Co.),
for personal injuries sustained by William J. Newburn on June 14,
1909.

The action was commenced on July 28, 1909, by Newburn
against said Terra Cotta Co. Subsequently Frederick Ayer and
Wells Brothers Company were made additional parties defendant.
On June 30, 1913, Newburn died from causes not claimed to have
resulted from said injuries and, upon his death being suggested,
the said bank, as administrator of Newburn's estate, was substi-
tuted as plaintiff. The jury returned a verdict finding the de-
fendant, Frederick Ayer, not guilty and the defendants, Terra
Cotta Co. and Wells Brothers Company, guilty, and assessed plain-
tiff's damages at \$1,500. Both of said last named defendants en-
tered motions for a new trial. On March 28, 1914, on motion of
plaintiff the cause was dismissed as to the defendant, Wells
Brothers Company, and the motions of the defendant, Terra Cotta
Co., for a new trial and in arrest of judgment were overruled, and
the judgment appealed from was entered.

The material facts as shown by the evidence are as fol-
lows: Newburn was a structural iron worker employed by Wells
Brothers Company, the contractor who had charge of the erection

of the building at the corner of Monroe and Franklin streets, Chicago. During the morning of the day of the accident Newburn and several other employees of Wells Brothers Company were engaged in putting a section of a smoke-stack into position in the basement of the building. There was a 9 x 12 opening in the first floor. This opening was also in the second and third floors above, but not in the fourth floor. The accident occurred about 3 o'clock on the afternoon of June 14, 1909. At this time Newburn and a co-employee were standing upon a plank laid across the opening and engaged in the work upon the stack. At this time also certain tile setters, employees of the Terra Cotta Co., were working between the third and fourth floors, right over where Newburn and other co-employees were working. These tile setters had been working there all day. The workmen below could look up through the opening, or shaft, and see the tile setters at work. A piece of tile fell and struck Newburn on the head. The witness Zieball testified: "The first I saw was when it hit Newburn. I was standing alongside of him and I caught hold of him. * * He leaned against me and I found that something had hit him on the head." The witness Pappold testified: "While we were standing there a piece of tile came down and hit Newburn on the head. I first saw it as it was falling down, after it hit Newburn, just about striking the floor. I noticed that the tile broke. It was a half tile." He further testified that he had been on the third floor a few minutes before the accident; that about three men were then working for the Terra Cotta Co. between the third and fourth floors; that they were standing on "herese" which rested on planks across the opening; that there were then no other men in the vicinity of the openings, and that while there were other men on the third floor the nearest of them to the opening was about 50 feet. After the accident Newburn appeared dazed and blood was running from his wounds. On the same day he was sent to a physician employed by Wells Brothers Company, who examined and treated him. This physician testified on the trial

that upon that examination he found a lacerated wound of the scalp, slightly over an inch in length, on the back of the head; that there was also a small puncture wound, which was superficial; that the lacerated wound necessitated two stitches; and that "there was apparently a slight involvement of the outer table of the skull, a slight depression." On the day following the accident Newburn was seen near the building with his head bandaged. Another physician, who examined him on the second day ^{after} the accident and subsequently treated him from time to time, testified that there was a depression in the skull; that his right pupil was dilated, that there was a general tremor of the left hand and arm, and that these conditions lasted about a week. Still another physician, who examined him about 40 days after the accident, testified that under the larger wound there was a depression of the skull, that Newburn was pale, and that there was a tremor of his hands and his reflexes were exaggerated, showing an unstable condition of the nervous system. Newburn was laid up and unable to work for about two months and lost in wages about \$240. He commenced working again on August 16, 1906, but did not do heavy manual labor. He was employed as foreman by different employers, and on one job acted as superintendent, receiving higher wages until his death than he received at the time of the accident. Mrs. Webber, a sister of Newburn's wife, testified that prior to the accident he was in perfect health; that after the accident when she talked with him he would seem confused and would talk about something else; that he acted this way up to the time of his death, but never did so prior to the accident. Mrs. Buchanan, with whom Newburn boarded for nine months during the 18 months prior to his death, testified that "he had a sort of a dreary way a great deal of the time," and that "he got off from one subject to another." Another witness testified to the effect that about a year after the accident he noticed that, while Newburn was apparently in good health, he "would try to tell something and forget it," and that "he would start off on another

subject, or stop in the middle of a sentence and think a while before he would speak again." (ad) ...

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is first contended by counsel for the Terra Cotta Co. that none of the three counts of the second amended declaration is sufficient to sustain the judgment. Inasmuch as counsel for plaintiff state in their brief that they rely solely on the third count as sustaining the judgment it is only necessary to consider that count. The Terra Cotta Co. filed a plea of the general issue thereto. After verdict, on motion in arrest of judgment or on appeal, everything which by fair and reasonable intendment may be inferred from the general averments of the count will be preserved in favor of the pleader. (O'Rourke v. Sproul, 341 Ill. 576, 578; Margent Co. v. Baublis, 315 Ill. 428.)

✓ It is alleged in ^{the third} said count, in substance, that on June 14, 1906, Frederick Ayer was the owner of a certain building then in course of erection in the city of Chicago; that said Wells Brothers Company was a contractor engaged in the erection of said building and that said Ayer and said Wells Brothers Company had charge, control and supervision of the erection thereof; that the Terra Cotta Co. was also engaged upon said building, laying tile above where deceased in his lifetime was then working; that deceased was then and there a servant of Wells Brothers Company, working under its direction at the bottom of a certain opening which extended upward through numerous floors of said building; that "it was then and there the duty of the defendants, and each of them, to exercise ordinary care for the safety of the deceased and to protect deceased from falling objects"; that it was also the duty of the Terra Cotta Co. "to exercise care in the handling of its tile at the place aforesaid"; yet the defendants "negligently and

carelessly failed to cover or protect the openings in said floors aforesaid," and the Terra Cotta Co. "also negligently and carelessly failed in the handling of its said tile to prevent said tile from falling through said openings," so that, by reason of the said several acts of commission and omission of said defendants, and while deceased was in the exercise of due care for his own safety, and while the defendants and each of them knew, or in the exercise of ordinary care should have known, of the danger to the deceased in his work there, "a piece of tile fell down through said openings and struck the deceased with great force and violence," whereby he was greatly and permanently injured, etc. ✓ It is urged by counsel that no such duty existed on the part of the Terra Cotta Co. as is alleged in said count. In this we think counsel are mistaken. In O'Rourke v. Sproul, 241 Ill. 576, 580, it is said: "One engaged in the construction of a building owes to another engaged in the same work and exercising due care for his own safety the duty of using reasonable care to avoid injuring him." See, also, Flanagan v. Wallis Bros. Co., 337 Ill. 82, and Larsen v. Enck Fire Escape Co., 243 Ill. 308. And we think that the breach of that duty and the negligence of the Terra Cotta Co. were sufficiently alleged. Our conclusion is that said third count is sufficient, at least after verdict, to support the judgment.

And in our opinion the court did not err in refusing the peremptory instruction, requested at the close of plaintiff's evidence, to find the Terra Cotta Co. not guilty. Newburn was not bound to anticipate negligence on the part of the employes of the Terra Cotta Co. who were engaged in said tile work, and it was a question for the jury whether Newburn had any reason to anticipate danger to himself in the absence of negligence on the part of said employes of the Terra Cotta Co. (O'Rourke v. Sproul, *supra*.) And the question of assumed risk is not involved, because Newburn was

not the servant of the Terra Cotta Co. (O'Rourke v. Sproul, supra.)

And we cannot agree with counsel's further contention that the verdict is against the weight of the evidence. It was said in the somewhat similar case of Essex Fire Insurance Co. v. Largent, 136 Ill. App. 331, 334: "The evidence on the part of appellee tends to show that appellee's injury was due to the negligence of appellant's employees. True, no one saw any of appellant's employees drop the drill or cause it to fall. But the evidence tends to show that appellant's servants were working above appellee and were using drills. This evidence is contradicted by testimony offered in behalf of appellant. We think, however, that considering all the evidence in the case the jury were warranted in finding that some employee of appellant negligently suffered or caused the drill to drop, without reaching that conclusion of fact upon mere conjecture or surmise." (See, also, Boehat v. Kniesely, 144 Ill. App. 351, 355, 365.) In the present case there was positive testimony given by some of plaintiff's witnesses that the tile setters employed by the Terra Cotta Co. were prior to and at the time of the accident working between the third and fourth floors and immediately above where Newburn was working. It is true certain witnesses for the Terra Cotta Co. testified on direct examination to the effect that none of its employees was there working at the particular time, but on cross-examination the strength of their testimony was materially lessened. We cannot say that the verdict is manifestly against the weight of the evidence.

Counsel further contend that one of the instructions - the 8th - given by the court at plaintiff's request is erroneous. We do not think that the instruction is objectionable for the reasons stated by counsel or that the giving of it constituted error prejudicial to the Terra Cotta Co.

And we cannot say that under all the evidence the damages

awarded by the jury were excessive or that the verdict was the result of passion or prejudice. Counsel argues that the amount of the verdict was caused by the calling of Mrs. Newburn to the stand. It appears that upon her replying to three questions which disclosed what her name was, where she lived, and that she was the widow of the deceased, the attorney for Telle Brothers Company objected to her further testifying on the ground of her incompetency. The attorney for the Terra Cotta Co. did not however object. She was immediately withdrawn as a witness by plaintiff's attorney. We cannot say that this incident caused a prejudice in the minds of the jury in favor of plaintiff, especially as it appeared from the testimony of other witnesses that the deceased was a married man at the time of his death.

Finding no reversible error in the record, the judgment of the Superior Court is affirmed.

AFFIRMED.

JON GUMINSKI,
Appellee,

vs.

ROBERT VARRANT,
Appellant.

AL. BRON WILSON COURT
OF COCK COUNTY.

1921 A. 634

APPEAL FROM THE DECISION OF THE COURT.

This is an appeal from a judgment of \$5.00 for personal injuries recovered by appellee, Jon Guminski, plaintiff, against the appellant, Robert Varrant, defendant.

✓ Guminski had been employed for nearly three years prior to the accident hereinafter mentioned, by defendant Varrant. He operated a drill press, helped build scaffolds, swept floors, repaired belts and did general work.

The accident occurred September 19, 1911. At the time he was injured plaintiff was alone, working by himself, repairing a belt. The belt ran horizontally along the ceiling of the factory from the main shaft to a counter-shaft about twenty-five feet. He reached the belt by means of a ladder upon which he stood while engaged in the work. The belt had been drawn off the pulley onto the shaft and was so slack as it lay on the shaft that it did not turn as the shaft revolved. It was further prevented from turning with the revolving shaft, while the plaintiff was making the repairs, by means of a monkey-wrench which had been fastened on the west edge of the belt about fourteen inches from the shaft, holding the two strands of the belt together. The shaft ran east and west and the belt north and south. He was between the two shafts near the north shaft. In some manner his hand was caught between the belt and shaft or pulley and the injury resulted. There is a conflict in the evidence as to how his hand was caught.

The cause was submitted to the jury on five counts. The first and fifth counts were based respectively upon common law liability. After the plaintiff rested his case, all but the second count were abandoned. Two other counts, so-called amended accounts, were then filed. An amended first count was filed based upon the common law liability. An amended count was also filed in place of the fifth count. A separate plea of the general issue and of the statute of limitations was filed instanter to both the amended counts. The court sustained the plaintiff's demurrer to the plea of the statute of limitations to both counts.

The defendant's theory of the case was that the plaintiff was free to use and did use his own methods in repairing the belt, and the fact that he was engaged to repair the belt was itself notice to him that the belt was out of repair. The plaintiff relied upon the negligent order and non-realization of danger and specific directions as to how the belt should be repaired. The judgment was entered after motions for a new trial and arrest of judgment had been overruled and denied.

The contention of defendant, appellant here, is that the original first count was based upon a violation of a statute, and that the amended first count was based upon the common law liability, and introduced a new cause of action, and was barred by the statute of limitations. In our opinion, this contention is not sound. The original first count was based upon the common law liability, and no new cause of action was introduced by the amended first count.

It is further contended that the evidence shows that the accident did not and could not have happened as the plaintiff claims. It is contended that when the plaintiff was

murt and called for help, the ladder on which he was standing was in an entirely different position from its position at the time he was repairing the belt. It is claimed that the top of the ladder was leaning against a truss-rod that helps to support the center of the beam which runs through the ceiling. The top of the ladder was slanting toward the north and the bottom was slanting south, so that a person standing upon the ladder would be facing north, whereas the ladder, while the plaintiff was engaged in repairing the belt, was leaning towards the east, and the argument is made that the plaintiff had finished repairing the belt and was engaged in putting it on the pulley at the time his hand was caught. There is some slight variance between the testimony of the plaintiff and the plaintiff's witnesses as to the manner in which the plaintiff's arm was caught by the belt, and crushed and injured over the revolving shaft. These were questions of fact for the jury, and we cannot say from the evidence that the verdict of the jury is wrong, or that the plaintiff's theory of the accident was incorrect. He was alone when the accident happened, and no other person saw the accident. The controversy seems to be as to whether his arm was carried under the shaft or pulley, or whether it was wound over the shaft or pulley by the belt. We see no reason for holding that the weight of the evidence is manifestly against the verdict.

The court refused to give the defendant's third instruction, which reads as follows:

"The court instructs the jury that if you believe from the evidence that the plaintiff was not injured while making repairs to the belt in question, but was injured after he had finished making said repairs and while he was placing the repaired belt back upon the pulley, then the plaintiff cannot recover as to the second count of his declaration, and as to said second count you should find for the defendant."

The second count was the only count left in the declaration based on an alleged violation of the statute relating to making repairs on active mechanisms or operative part of any machine when it is in motion. It is predicated on the last sentence of Sec. 1 of the Hazardous Machinery Act, Laws of 1902, p. 282. We find no evidence in the record upon which the instruction could be based, and, in our opinion, the court did not err in refusing to give it to the jury.

The plaintiff was permitted to exhibit his forearm and hand to the jury over the objection of the defendant. It is urged by the defendant that there was no issue or controversy in the case as to the nature and extent of the injury, and that the exhibition of the plaintiff's hand and arm to the jury was calculated to highly inflame the minds of the jury and not to prove any issue of fact in the case. ✓ As stated in Chi. & Alton R. R. Co. v. Clausen, 173 Ill. 100, at page 106:

"It is questionable whether the exhibition was proper under the circumstances and whether its only effect would not be to excite feeling rather than to aid in settling any disputed question; but we do not feel prepared to say that such was the case, or that there was a clear abuse of the discretion confided to the trial court."

In that case, as in this, the plaintiff was permitted to exhibit to the jury the injury caused by the accident, and it is urged here that there was no legitimate purpose to be served by the exhibition of the plaintiff's hand and arm to the jury, but that it did cause positive and serious harm to the defendant for the reason that the arm had a running sore and was discharging pus, and was nauseating to look upon. The contention is not without force, and if we could see from the amount of the verdict that the jury was so affected or impressed with the exhibition of the injuries to the arm that they were led to

give a large and unreasonable verdict, we should be inclined to hold that the discretion of the court, in allowing the exhibition of the injured arm and head, was abused, and that the court committed error. But, considering the testimony as to the nature and permanence of the injury, the amount of the verdict does not seem to appear that any such effect was produced upon the minds of the jury, and we do not think that the error, if it was an error, is reversible.

It is further contended that the cause of action set forth in the amended fifth count was outlawed and obnoxious to the defendant's plea of the statute of limitations, and that the court erred in sustaining a demurrer to the defendant's plea. In our opinion, the court did not err in this regard.

Upon a review of the evidence, we cannot say that the plaintiff is shown to have been guilty of contributory negligence. True, the plaintiff knew of the defective condition of the belt, but it is not shown that he knew and appreciated the danger arising from the condition of the belt which caused it to be caught by the revolving shaft. Where a servant knows of a defective condition but does not appreciate the danger arising therefrom, he is not precluded from recovery. The inference from the evidence which may be legitimately drawn is that there was at least one loose and unglued flap or portion of the belt which caught on the revolving shaft, and plaintiff claimed that he did not know or appreciate the danger of this loose or unglued piece of the belt catching upon the shaft, and did not appreciate any danger of that character. He was ordered to shorten the belt and was engaged in that work at the time he was injured. According to his testimony, he was engaged in pulling the lace through the belt when the belt turned

and caught his hand. It was a fair inference for the jury to draw that the repairing of the belt, while the shaft was in motion, was a danger of which the plaintiff had no knowledge or appreciation.

Finding no reversible error in the record, the judgment is affirmed.

REVEREND.

AMIE I. ADAMS,
Defendant in Error,
vs.
EDWARD S. ADAMS,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

192 I.A. 638

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a decree in a default divorce case. The complainant below, in her bill, alleged habitual drunkenness on the part of the defendant for the space of more than three years as the only ground for divorce. The usual averments of marriage, residence and the faithful performance by the complainant of her duties and obligations as a wife are made in the bill.

Personal service of summons on the defendant was had, but he did not enter his appearance, and an order of default was entered against him. The evidence was heard in open court before the chancellor, and the decree was entered upon such hearing. The defendant now seeks to reverse the decree on the ground that complainant failed to prove the cause of divorce by "reliable witnesses according to the statute."

Two witnesses testified to the ground of divorce alleged in the bill,- the complainant and Dr. Small, her brother-in-law. The testimony of the complainant is full and circumstantial and covers the last six years of the married life of the parties. Dr. Small's testimony fully supports the testimony of complainant, and further shows that the defendant's physical and mental condition is due to alcoholism. The evidence in the case is amply sufficient to make

out a case of habitual drunkenness for more than two years, in accordance with the provisions of Sec. 8 of the Divorce Act, relating to bills taken as confessed.

The allegations of the bill as to the faithful performance by complainant of her duties and obligations as a wife are sufficiently proven by the evidence.

We find no error in the record, and the decree is affirmed.

AFFIRMED.

209 - 19214.

TRIBUNE COMPANY, a corporation,
Defendant in Error,
vs.
ANNA B. WENDELL,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1921 A. 639

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

In this suit instituted in the Municipal Court by the Tribune Company, against Anna B. Wendell, the plaintiff filed its statement of claim as follows:

"Plaintiff's claim is for money due for advertising inserted in the Chicago Tribune under the terms of a certain contract in writing executed April 9, 1910, said contract was executed by E. E. Wendell, husband of the defendant herein who is herein sued as the undisclosed principal of said E. E. Wendell, who as her agent in the conduct of the tailoring business known as E. E. Wendell controlled and operated by the defendant herein executed said contract."

The affidavit of claim states that there is due the plaintiff \$636.36. Defendant's affidavit of merits sets forth as grounds of defense that defendant never authorized said E. E. Wendell to enter into any agreement with the plaintiff on her behalf, nor ever ratified said agreement, nor entered into any agreement with the plaintiff; that plaintiff sued and recovered judgment for \$636.36 and costs against E. E. Wendell, husband of defendant, upon the same cause of action, in the Municipal Court on April 24, 1911, on which judgment an execution was issued and returned no part satisfied; that plaintiff had knowledge and notice, prior to bringing said suit against said E. E. Wendell, that he was the agent of defendant, and that plaintiff, having elected to hold the said agent upon the same cause of action in said prior suit, is estopped from holding defendant thereon.

Upon the close of all the evidence, at the trial of the case before a jury, the court instructed the jury to return a verdict for the plaintiff, and upon the verdict so returned judgment was entered against defendant for the amount of the claim. This writ of error is prosecuted to reverse such judgment. ✓

The contract sued on is under seal executed by E. E. Wendell, the husband of plaintiff in error, in his individual capacity. The record discloses that prior to the commencement of the present suit against plaintiff in error, defendant in error brought suit in the Municipal Court against E. E. Wendell upon the same cause of action, and there recover a judgment against him for the like amount. ✓

The trial of the present case in the Municipal Court appears to have been conducted by plaintiff in error mainly upon the theory that defendant in error with knowledge and notice that plaintiff in error was the undisclosed principal of E. E. Wendell, who executed the contract, having elected to proceed against the agent, E. E. Wendell, was thereby estopped from proceeding against plaintiff in error upon the same cause of action. Windsor v. Fallon, 151 Ill. App., 405; Linscaine & Carrigan Mfg. Co. v. Bockmeyer, 135 Ill. App., 403. It is clear from the record that the main controversy at the trial was upon the issue of fact as to whether or not defendant in error, when it proceeded to judgment against E. E. Wendell, had knowledge and notice that plaintiff in error was his undisclosed principal.

The record discloses, and it is practically conceded by counsel for defendant in error, that there was evidence introduced by plaintiff in error tending to show that defendant in error had such knowledge and notice, but the

action of the trial court in giving to the jury the peremptory instruction to find the issues for defendant in error is sought to be extended upon the ground that such evidence introduced by plaintiff in error is so contradictory and irreconcilable that it had absolutely no value as proof, and the argument here of counsel for defendant in error is mainly directed to a consideration of the weight to be accorded such evidence.

Necessarily, the trial court in giving to the jury a peremptory instruction to find the issues for defendant in error, either entirely ignored the evidence introduced on behalf of plaintiff in error, or upon a consideration of the weight of the evidence bearing upon the issues of fact concluded that it preponderated in favor of defendant in error. "On a motion to direct a verdict the evidence is not weighed, but the evidence in favor of the party against whom the motion is directed must be considered in its most favorable light to him, with all the inferences in his favor which can be legitimately drawn therefrom." O'Leary v. Chicago City Ry. Co., 233 Ill., 187.

The peremptory instruction should have been reversed.

Plaintiff in error is sought to be held liable as the undisclosed principal of her husband, E. E. Wendell, upon a contract under seal executed by said E. E. Wendell in his individual capacity.

The settled rule of law in this state, and by which we are bound, is stated in Walsh v. Murray, 187 Ill., 483, thus:

"The rule in regard to instruments under seal made by an agent is, that in order to bind the principal and to make it his contract it must purport on its face to be his contract and the seal must purport to be his. An agent cannot ordinarily bind the principal by a sealed contract executed in his own name, nor can the principal ordinarily avail himself

of such a contract and sue the other contracting party thereon. An undisclosed principal whose authorized agent has made such a contract in his behalf can neither sue nor be sued on it."

And it was further held in that case that the fact that the contract would have been valid without a seal, and that the authority to execute it might, therefore, be by parol, was immaterial.

The rule announced in the Walsh case, supra, was adhered to in the later case of Buriger v. Permyer, 179 Ill., 588.

The rule was also followed and applied by this court in Chicago Title & Trust Co. v. Franklin, 187 Ill. App., 388, wherein a petition for certiorari was denied by the Supreme Court.

The application of this rule in the instant case precludes a recovery by defendant in error against plaintiff in error upon the contract set up in the statement of claim.

It is here suggested by counsel for defendant in error that a recovery may properly be had against plaintiff in error upon the theory that plaintiff in error and her husband, E. E. Wendell, were co-partners in business and were liable as such upon the contract executed by said E. E. Wendell, one of said co-partners, in furtherance of the partnership business. A complete answer to this suggestion is that plaintiff in error and said E. E. Wendell are not here sued as co-partners.

It is further contended that as the contract on its face states that the advertising to be furnished therein was for "the tailoring business of the advertiser", and as the advertiser in this case was the plaintiff in error, such contract created an implied obligation on the part of plaintiff in error, who was the principal to E. E. Wendell. The in-

firmity in this contention is that the contract expressly refers to E. E. Wendell as the person designated as "advertiser" therein.

In the performance of its duty, as stated by counsel, to decide cases upon the merits, the court is not warranted in ignoring the application of well settled rules of law to the admitted or established facts in a case. A case is decided upon the merits within the meaning of the statute when it is decided upon an application of well settled rules of law to the admitted or established facts.

The judgment of the Municipal Court is reversed.

DISSENT REVEREND.

200 - 12009.

THE PEOPLE OF THE STATE OF ILLINOIS,
for the use of ISRAEL BENJAMIN,

Appellee,

vs.

WILLIAM A. SNYDER et al.,

On Appeal of
THE TITLE GUARANTEE & TRUST COMPANY,
a Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

1921A.641

MR. PRESIDING JUSTICE BAILEY
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the Circuit Court in the name of the People, for the use of Israel Benjamin, against William Snyder and The Title Guarantee & Trust Company, principal and surety, respectively, on the official bond of said Snyder as constable. Service of summons was had upon the surety only, and a trial resulted in a verdict and judgment against it for \$3,000 debt and \$3,270 damages. The surety appeals.

✓ The declaration alleges the election and qualification of Snyder as constable, the giving of the bond upon and its approval by the county clerk, and assigns as a breach of its conditions that one L. R. Huston on June 30, 1906, before a justice of the peace in Cook County, obtained two judgments against Tobias B. Lane, one for \$200 and the other for \$125; that on July 31, 1906, executions were issued on both said judgments and placed in Snyder's hands for service; that on July 31, following, said Snyder levied upon and carried away certain described jewelry, clocks, watches, fountain pens and other furnishings belonging to Israel Benjamin, of the value of \$3,000; that said Benjamin, before or at the time of said levy informed said Snyder that he, Benjamin, was the owner of

said goods and chattels and protested against said Sheriff levying upon and taking and carrying away the same or any part thereof.

The issues were made upon three pleas filed by appellant.

First, non est factum, unverified, and not now relied upon; second, a denial that Benjamin was damaged; and third, a denial that Benjamin was the owner of the goods and chattels levied upon. ✓ (admission 3)

It is first urged that the trial court improperly admitted in evidence certified copies of the proceedings had before the justice of the peace, wherein judgments were rendered against Tobias D. Leach; also certified copies of the executions issued on said judgments and of the returns of the constable thereon. This proof was offered by appellee for the purpose of showing the return of the constable on said executions.

Section 17 of the act entitled "Evidence and Depositions", provides, in part, as follows:

"The proceedings and judgments before justices of the peace may be proved by a certified copy thereof, under the hand and private seal of the justice before whom such proceeding or judgment is had, or his successor, having the custody of the same." R. S. 1913, p. 1237.

It is not necessary to determine whether an execution issued by a justice of the peace and the return of the officer thereon are such "proceedings" within the contemplation of the statute, as may be proved by a certified copy thereof, because the matters sought to be thus proved by appellee were admitted by appellant under the pleadings. Appellant cannot have been prejudiced by the admission of incompetent evidence of matters which were admitted by it, and which it was, therefore, not incumbent upon appellee to prove.

The plea of non est factum, unverified, and now abandoned by appellant, admitted the alleged breaches in the

bond and excused appellee from making proof thereof. Leban
v. U. S. Fin. & Com. Co., 127 Ill. App., 388.

As applied to the bond here sued on the plea of
non damnification admitted that the condition had been broken
as alleged in the declaration. Boers v. Hawley, 18 Ill. App.,
947; Electric & Thermal Co. v. W. Chicago St. Ry. Co., 79 Ill.
App., 488.

✓ Appellant's plea averring that the property in ques-
tion was not the property of Benjamin, was, by leave of court,
filed by it upon the close of the evidence for appellee, and
it is insisted that the verdict of the jury upon the issue
made by this plea is against the manifest weight of the evidence.

It was contended by appellee that in July, 1906,
when the constable levied the executions upon the property in
question, said property belonged to the judgment debtor, Lende,
and not to Benjamin. The only substantial controversy upon
the trial in the court below related to this issue.

Sometime prior to February, 1906, Lende was adjudged
a bankrupt and on or about February 10, 1906, the assets of
said bankrupt, including a portion of the property here in-
volved, were struck off and sold to Benjamin for his bid of
\$3,135, and the trustee of said bankrupt's estate was directed
to turn over such assets to Benjamin.

The testimony discloses that Benjamin paid for the
property with his certified check for the amount of his bid;
that the property was then in the store building formerly
occupied by the judgment debtor, Lende, and where, prior to
his bankruptcy, he conducted the jewelry business; that at the
time of the purchase of the property by him, Benjamin was 21
years of age and was a clerk in the employ of a firm doing a
wholesale jewelry business; that he borrowed from various
parties the greater part of the money which he paid for the

property; that immediately upon his purchase of the property he procured a consignment of diamonds from the firm by which he was employed and mingled the same with the stock of goods so purchased by him; that he directed Lande to put his, Benjamin's, name on the outside of the store, and that he then, also, placed on the front of the store a piece of paper whereon was written or printed the words, "I. Benjamin is the owner of this property"; that on the sign in front of the store, whereon appeared the name "T. D. Lande", he caused to be placed immediately above said name printed signs whereon appeared in small letters the words, "I. Benjamin, successor to"; that he personally did nothing with the property from the time he purchased the same in February, 1903, until it was levied upon by the constable in July following.

Accellant disclaimed upon the trial any purpose of showing that any part of the money which Benjamin paid for the property was obtained from or belonged to the judgment debtor, Lande. ✓

While there are some facts and circumstances in evidence which tend to cast a degree of suspicion upon the good faith of the transaction, they are not so inconsistent with a justifiable purpose on the part of Benjamin to avail himself of the good will of the business established by Lande as to warrant us in holding that the verdict of the jury finding that Benjamin was the true owner of the property is against the manifest weight of the evidence.

Statements made by the constable at the time he made the levy and in connection therewith were a part of the res gestae and as such were properly admissible in evidence.

Referring to Lande, the witness, Greenberg, was asked this question: "Was 452 West Madison his place of business when you and constable Snyder went down there?" The

answer to the question called for the same conclusion of the witness and the objection to the question by counsel for appellee was properly sustained.

The only evidence relating to the question of damages, or the value of the goods levied upon and taken by the constable, is found in the testimony of Benjamin. No countervailing evidence was offered by appellant, and upon the record as made we find no substantial ground to warrant our interference with the verdict of the jury upon that issue.

There is no prejudicial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

